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No. 96-____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DONNA PATTERSON and NICHOLAS BROWN,
Petitioners,
v.

P.H.P. HEALTHCARE CORPORATION
and MARK KENNEDY

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether preponderant evidence of actual emotional injury is sufficient to support an award of compensatory damages under the civil rights laws, with or without corroboration of the victim's testimony or proof of physical manifestations of harm.

2. Whether proof of a supervisor's or manager's malicious conduct is sufficient to support an award of punitive damages against a corporation under 42 U.S.C. §§ 1981 and 1981a, with or without evidence of corporate officers' complicity.

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Donna Patterson and Nicholas Brown hereby petition this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (App. A at 1a-34a) is reported at 90 F.3d 927. The opinion of the district court (App. B at 35a-43a) is unreported.

JURISDICTION

The court of appeals issued its decision on July 25, 1996 and denied rehearing (App. C at 43a) on September 11, 1996. Accordingly, this petition is filed within the

time allowed by law. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

The opinions of the courts below catalog reprehensible conduct. The facts, as found by the district court, and sustained by the court of appeals, are as follows:

PHP Healthcare provided psychiatric services under a contract with the United States Army to Army personnel at Fort Hood, Texas. The project manager for this facility, *i.e.*, the most senior PHP Healthcare employee at the facility and its chief administrative officer, was Mark Kennedy.[1] Petitioner Donna Patterson was the chief nurse at the facility; Nicholas Brown served as a mental health technician.

Less than one month after PHP's Fort Hood facility had been opened, Kennedy met individually with each of his black employees to discuss a complaint that had been filed with the Equal Employment Opportunity Commission. Kennedy, who is white, warned his black employees that he would not tolerate any EEOC complaints filed against PHP Healthcare. After these meetings, Kennedy met with Ms. Patterson and said that "these stupid niggers have to understand that I carry a big stick." App. A at 3a.

Kennedy routinely referred to his black employees as "porch monkeys" and "niggers" and he specifically referred to petitioner Nicholas Brown in these terms. App. A at 3a-4a; App. B at 36a. Moreover, he stated that he considered blacks to be "shiftless" and "lazy." App. A at 4a. Kennedy scheduled black employees for the less desirable night shift and in other ways imposed his intense racial hatred on the black employees of PHP Healthcare. App. A at 3a. Whenever black employees were terminated or

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[1] Kennedy was named individually as a defendant in the district court.

left PHP Healthcare, Kennedy replaced them with white employees. App. A at 6a.

In March 1992, a meeting was held in which the black employees complained about being assigned to the less desirable night shift. After this meeting, Kennedy told Ms. Patterson that "not another nigger is to be hired." App. A at 3a; App. B at 37a. However in August 1992, Ms. Patterson hired another black mental health technician. Around the same time, she had contacted PHP Healthcare's headquarters to call attention to Kennedy's discriminatory actions. App. A at 7a. On August 17, after returning from a meeting at corporate headquarters, Kennedy fired Ms. Patterson. Ms. Patterson's actions in contacting PHP Healthcare's headquarters and in hiring another black employee were the producing causes of her termination. *Id.*

Kennedy twice threatened to impose disciplinary action on Mr. Brown on the basis of memos and reports that Kennedy had falsified. As the district court found, PHP Healthcare discriminated against Mr. Brown by limiting his work schedule, assigning him certain menial duties that were not performed by white employees, denying him the opportunity for promotion, and by falsifying documents in order to take disciplinary action against him. App. A at 6a; App. B at 36a-37a. After Ms. Patterson was fired, her replacement as head nurse told Mr. Brown that she had no interest in hearing any complaints of black employees. App. A at 5a.

After suffering this unrelenting barrage of race discrimination and harassment for six months, on September 1, 1992, Mr. Brown submitted his resignation. Later that day, however, he participated in a conference call with Kennedy and PHP Healthcare's vice president for human resources. During this call, Mr. Brown was assured by the company's vice president that the work environment would change. In light of this assurance, Mr. Brown requested to withdraw his resignation. This

request was refused, however, as Kennedy told Mr. Brown that he was no longer needed and that his job had been filled. App. A at 5a.

Based upon this evidence, the district court (sitting without a jury) had no difficulty entering judgment against PHP Healthcare in Ms. Patterson's Title VII [2] claim and against PHP Healthcare and Kennedy jointly and severally in Mr. Brown's § 1981 claim. The court awarded equitable relief in the nature of reinstatement, back pay and attorney fees (App. B at 41a) and also awarded compensatory and punitive damages to Ms. Patterson and Mr. Brown. Specifically, the court awarded Ms. Patterson $150,000 in compensatory damages for "emotional damage[] and mental pain and suffering" and "[p]unitive damages in the amount of $150,000." App. D at 45a. The court awarded Mr. Brown $40,000 in compensatory damages and $150,000 in punitive damages. *Id.*

On PHP Healthcare's and Kennedy's appeal, the court below affirmed in part and reversed in part. After conducting a thorough review of the record, the court found "ample evidence supporting the district court's findings as to liability." App. A at 9a. So too, the court affirmed the district court's award of reinstatement and attorney fees. App. A at 12a; 33a. With respect to both compensatory and punitive damages, however, the court below reversed and vacated the district court's judgment.

Noting that Mr. Brown "presented no corroborating testimony nor . . . offer[ed any] medical or psychological evidence of damages," the court below vacated his $40,000 emotional distress award "with instructions for the district court to award nominal damages." App. A at 21a-22a. Concluding that "[h]urt feelings, anger and frustration are part of life," App. A at 22a, the court below discounted completely Mr. Brown's testimony concerning the emo-

[2] 42 U.S.C. § 2000e-5. Unless otherwise noted, all statutory references herein are to Title 42, United States Code.

tional trauma he suffered as a result of PHP Healthcare's and Kennedy's racism.[3]

Similarly, the court vacated Ms. Patterson's $150,000 emotional distress award. Notwithstanding her testimony that she was scarred by her termination and subsequent full year's unemployment, and that she endured severe family hardships when she had to leave her children to take work in other cities, App. A at 23a-24a, the court held that "th[e] record is void of sufficient evidence to support anything more than nominal damages . . .". App. A at 24a. Specifically, the court concluded that "Patterson's testimony alone" was not "competent evidence" to support an emotional distress award. *Id.*

So too, the court vacated the district court's punitive damage awards. The court vacated and remanded Mr.

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[3] Although not recited in the lower courts' opinions, Mr. Brown's testimony concerning his emotional injury was extensive. He testified about his anger upon learning that he had been referred to as a "porch monkey" (Tr. 415); his frustration and loss of trust caused by working for a person who hated him simply because of the color of his skin (Tr. 420); and his loss of self esteem and his feeling that he and his work had no value (*id.*). He further testified that the conditions he suffered at work caused friction at his home and affected his relationship with his wife and children (Tr. 422); and that being judged in the workplace simply on the basis of the color of his skin made him feel terrible: "[I]f I'm educated enough to give the proper care that I was giving to those patients, . . . why should I be judged by the color of my skin? We bleed the same, you know." Tr. 423. *See also* Tr. 447 (Mr. Brown describes "paranoia" lasting through the time of trial caused by his treatment at PHP Healthcare). In addition to taking this testimony, the trial judge was able to observe Mr. Brown's demeanor on the stand, including the fact that he was moved to tears as he recalled his experiences at PHP Healthcare. Tr. 448. Finally, the district court found that Mr. Brown had been constructively discharged from PHP Healthcare, a finding that, under Fifth Circuit precedent, required proof that "the employer made the employee's working conditions so intolerable that a reasonable employee would feel compelled to resign." *Barrow v. New Orleans S.S. Ass'n*, 10 F.3d 292, 297 (5th Cir. 1994).

Brown's $150,000 punitive damage award against Kennedy under § 1981 as excessive. App. A at 30a. Further, the court reversed outright both Mr. Brown's § 1981 and Ms. Patterson's Title VII (§ 1981a) punitive damage awards against PHP Healthcare, holding that because "Kennedy was not a corporate officer of PHP Healthcare," App. A at 30a, "his actions alone, without some evidence showing that PHP Healthcare knew or should have known of Kennedy's malicious or reckless conduct, are insufficient to cause punitive liability to directly attach to PHP Healthcare." App. A at 31a.

This petition timely followed.

REASONS FOR GRANTING THE PETITION

This case presents issues of substantial public importance concerning the relief available to victims of unlawful discrimination and retaliation. In 1991, Congress enhanced Title VII, among other ways, by providing a damages remedy for victims of invidious discrimination. Since that time, the lower courts have been striving to define the dimensions of this damages remedy, sometimes in irreconcilably inconsistent ways. The court below held that uncorroborated testimony of the victim of discrimination or retaliation is not competent evidence to support an award of damages for emotional distress. This holding is demonstrably wrong as it flouts the teachings of this Court, conflicts with the decisions of the majority of circuits and is inconsistent with the Equal Employment Opportunity Commission's construction of Title VII. Similarly, the lower court's holding that punitive damages are awardable only upon evidence of malicious or reckless conduct by corporate officers conflicts with the decisions of virtually every other court that has considered this issue and is as well devoid of statutory support. Review by this Court is necessary to resolve the split in the circuits on these issues and to vacate the lower court's aberrant construction of our Nation's principal laws prohibiting workplace discrimination.

I. ONLY PREPONDERANT EVIDENCE OF ACTUAL INJURY IS NECESSARY TO SUPPORT AN AWARD OF DAMAGES FOR EMOTIONAL DISTRESS

1. The court below vacated the emotional distress damages award for both Mr. Brown and Ms. Patterson (with instructions for the district court to award nominal damages) because in its view the testimony of the victim of discrimination alone is not "competent evidence" to support such an award. App. A at 24a. Significantly, the court below did not simply reduce the damage awards as excessive; rather it held that because there was no evidence to corroborate the victims' testimony concerning their emotional distress, there was no competent evidence to support **any** emotional distress damage award beyond nominal damages.

In reaching this conclusion, the court relied on language from *Carey v. Piphus*, 435 U.S. 247, 264 n.20 (1978); specifically, the court below focused on this Court's observation that emotional injury "may be evidenced by one's conduct and observed by others." *Id.* Apparently, the court concluded that because emotional injury "may be . . . observed by others," it may not be proved absent testimony from those observers.

The court below plainly erred in reading *Carey* as establishing a heightened evidentiary requirement to support an award of damages for emotional distress. *Carey* arose upon a record where "there is no proof of individualized injury to the plaintiff" and the question before the Court was whether substantial emotional distress damages could be awarded in the absence of **any** proof of actual emotional injury. 435 U.S. at 252-53. And, of course, the Court held that absent proof of actual injury, only nominal damages were available. 435 U.S. at 266. *See also Memphis Community School District v. Stachura*, 477 U.S. 299, 307-08 (1986) (summarizing *Carey* as

holding that "[w]here no injury was present, no 'compensatory' damages could be awarded.").

Thus, *Carey* provides no support for the heightened proof requirement imposed by the court below—that issue was neither presented nor decided. Indeed, far from imposing a heightened evidentiary requirement for proof of emotional injury, the Court recognized that such injuries are easily and routinely proved. *See Carey*, 435 U.S. at 263-64 (finding no reason to "presume" emotional injury in cases of unconstitutional deprivations because the Court could "foresee no particular difficulty in producing evidence that mental and emotional distress actually was caused," and because "[d]istress is a personal injury familiar to the law.").

The court below required petitioners to prove their emotional injuries not just by preponderant evidence, but instead by preponderant evidence plus corroboration. In so doing it perverted this Court's holding in *Carey*; so too, it defied this Court's holding in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Specifically, in *Price Waterhouse*, this Court held:

> Conventional rules of civil litigation generally apply in Title VII cases, see, *e.g.*, *United States Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983) (discrimination not to be "treat[ed] . . . differently from other ultimate questions of fact"), and one of these rules is that **parties to civil litigation need only prove their case by a preponderance of the evidence.**

490 U.S. at 253 (emphasis added). There is no dispute that petitioners presented preponderant evidence that they suffered actual injury as a result of their unlawful treatment. Indeed, as noted above, the court below sustained the district court's holding that Mr. Brown has been constructively discharged, a finding that necessarily required proof that "the employer made the employee's working conditions so intolerable that a reasonable employee

would feel compelled to resign." *Barrow v. New Orleans S.S. Ass'n,* 10 F.3d at 297. But this preponderant evidence was not good enough for the court below. Rather, because there was no corroborating evidence of petitioners' emotional injuries, their testimony was not even deemed competent.

As this Court held in *Price Waterhouse,* there is nothing so special about discrimination cases that requires courts to adopt new rules of decision. In civil litigation generally, proof, including proof of damages, need only be made by preponderant evidence. By imposing a heightened proof requirement on victims of discrimination, *i.e.,* by requiring them to prove their injuries by **corroborated** preponderant evidence, the court below has done precisely what *Price Waterhouse* and *Aikens* forbid.

Finally, although this case was tried without a jury, it is significant that the court of appeals' requirement of corroborating evidence to prove emotional injury conflicts with its own pattern jury instructions. Specifically, Fifth Circuit Pattern Jury Instruction No. 2-18 (West 1996) provides, in pertinent part:

> The testimony of a single witness may be sufficient to prove **any** fact, even if a greater number of witnesses may have testified to the contrary, if after considering all the other evidence you believe that single witness.

(Emphasis added). *See also* Devitt, Blackmar and Wolff, FEDERAL JURY PRACTICE AND INSTRUCTIONS, § 72.14 (West 1987) ("The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for the proof of **any** fact. . ."). The court below has carved out an exception to this instruction—"except for proof of emotional distress in civil rights cases"—an exception that is born of a perversion of *Carey* and defiance of *Price Waterhouse* and *Aikens.* Review by this Court is necessary to correct the important question

of federal law that the court below decided in conflict with applicable decisions of this Court.

2. The court below vacated petitioners' emotional distress damage awards because in its view no record evidence corroborated their testimony of emotional injury. *See* App. A at 21a-22a ("Brown presented no corroborating testimony nor did he offer expert medical or psychological evidence of damages caused by his alleged distress"); App. A at 24a (distress "**must be supported by competent evidence concerning the injury** [and] Patterson's testimony **alone** does not meet this threshold") (second emphasis added). Yet virtually every other circuit that has considered whether a victim's testimony alone may support an award for emotional injury has either held explicitly that such testimony may be sufficient to support an emotional distress award or has sustained a substantial award for emotional damages based solely on the victim's testimony. Accordingly, in requiring corroborating evidence to support anything beyond a nominal damage award, the court below has strayed from the other circuits. Review by this Court is necessary to resolve this split in the circuits and to conform the Fifth Circuit's view to the proper and predominant interpretation of the law.

At least three circuits have explicitly held that corroboration is not necessary to prove emotional distress. In *Williams v. Trans World Airlines*, 660 F.2d 1267, 1272-73 (8th Cir. 1981), the Eighth Circuit confronted the question of emotional distress damages in a § 1981 employment discrimination case. In reversing the district court's failure to award damages for emotional distress, the court noted:

> We have held that the plaintiff's own testimony may be solely sufficient to establish humiliation or mental distress.

Id., 660 F.2d at 1273.

Similarly, in *United States v. Balistrieri*, 981 F.2d 916, 931 (7th Cir. 1992), *cert. denied*, 510 U.S. 812 (1993), the Seventh Circuit dealt with a housing discrimination case in which "[a]ll of the evidence of emotional distress came from the testers' own testimony . . . [without] corroboration from any source." In specifically rejecting the argument that the evidence of emotional distress was insufficient, the court held:

> [W]hen the injured party provides the sole evidence, he must reasonably and sufficiently explain the circumstances of his injury and not resort to mere conclusory statements. This is not to say, however, that an injured person's testimony can never be sufficient by itself, or in conjunction with the circumstances of the particular case, to establish damages for emotional distress.

Id., 981 F.2d at 931-32 (internal quotations and citations omitted).

Most recently, the Fourth Circuit addressed this question in *Price v. City of Charlotte, N.C.*, 93 F.3d 1241 (4th Cir. 1996), a race discrimination case under § 1983. After surveying the applicable circuit authority, the court held:

> [W]e conclude that a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress based on a constitutional violation . . .

Id., 93 F.3d at 1254.

In the Third Circuit, the question of the necessity of corroborating evidence to support an award for emotional distress has explicitly been left open. In *Spence v. Board of Educ. of Christina School District*, 806 F.2d 1198, 1200-01 (3d Cir. 1986), the court addressed the adequacy of evidence to support an emotional damage award under § 1983. In sustaining the district court's refusal to award compensatory damages, the court held:

> We need not decide whether a verdict for emotional distress may ever be supported solely by a plaintiff's own testimony.

Id., 806 F.2d at 1200-01 (citations omitted). However in *Bolden v. Southeastern Pennsylvania Transportation Authority*, 21 F.3d 29 (3d Cir. 1994), the court rejected the notion, adopted by the court below, that *Carey* creates a heightened evidentiary standard for proof of emotional injury:

> *Carey*'s requirement that actual injury be proven before a plaintiff may recover serves merely to ensure that plaintiffs are not compensated for illusory injury. We must bear in mind that the civil rights laws are intended in part to provide broad, consistent recompense for violations of civil rights.

Id., 21 F.3d at 35. In specifically rejecting the argument that expert medical testimony was necessary to establish emotional injury, the court concluded that

> [i]n light of the purpose of the civil rights laws we have described, we see no reason to require that a specific type of evidence be introduced to demonstrate injury in the form of emotional distress.

Id., 21 F.3d at 36. Thus, while the Third Circuit has not squarely answered the question of whether corroborating evidence is necessary to support an emotional distress award, it has disavowed the notion that *Carey* creates a heightened evidentiary requirement for proof of emotional injury.

Almost without exception, the remainder of the circuits have at least implicitly rejected a requirement of corroborating evidence to prove emotional distress. The Second Circuit, for example, without any discussion of the question, sustained an award of emotional distress based solely on the victim's testimony. *See Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 906 (2d Cir. 1993) (sustaining award for emotional distress in

housing discrimination case). Similarly, in *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir. 1994), the Sixth Circuit sustained an award for emotional injury in a § 1983 case that was predicated solely upon the plaintiff's testimony. *See also DeNieva v. Reyes*, 966 F.2d 480, 487 (9th Cir. 1992) (sustaining emotional distress verdict based solely on the victim's testimony); *Secretary, Department of Housing and Urban Development v. Blackwell*, 908 F.2d 864, 872-73 (11th Cir. 1990) (same); *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1238 (D.C. Cir. 1984) (same).

Of all the circuits, apparently only the Tenth joins the court below in holding that corroborating evidence is necessary to prove emotional injury in civil rights cases. In *Koopman v. Water District No. 1 of Johnson County, Kansas*, 41 F.3d 1417 (10th Cir. 1994), *cert. denied*, 116 S. Ct. 420 (1995), the court sustained the trial court's refusal to let damages go to the jury. The court held:

> Testimony by a plaintiff, and by one close to him or her, of emotional distress, supported by inferences readily drawn from the facts surrounding and following from the denial of procedural due process are sufficient to support an award of damages. Here, Koopman offered no witness to corroborate his testimony as to his mental state.

Id., 41 F.3d at 1420.

These cases show that the lower courts are in disarray with respect to the necessity of providing corroborating evidence to sustain an award of damages for emotional injury in civil rights cases. The Fourth, Seventh and Eighth Circuits have all explicitly held that corroborating evidence is **not** necessary, while the court below and the Tenth Circuit have held that it is. Many other circuits have implicitly held that the victim's testimony alone may be sufficient, but the Third Circuit has expressly left this question open. Review by this Court is necessary to resolve this split in the circuits and decide finally this important question of federal law.

3. The court below intimated that its direction for awards of nominal damages to petitioners was consistent with the Equal Employment Opportunity Commission's interpretation of the Civil Rights Act of 1991. App. A at 20a; 24a. While the court below was correct to defer to the EEOC's interpretation of the 1991 amendments, *Equal Employment Opportunity Commission v. Commercial Office Products Co.*, 486 U.S. 107, 115 (1988), it wholly misconceived the letter and intent of the EEOC's pronouncements concerning nonpecuniary damages. Review by this Court is necessary to conform the decision below with the EEOC's guidance and to accord the EEOC the primacy in interpreting Title VII to which it is entitled.

First, neither the EEOC's policy guidance nor its published decisions supports the lower court's conclusion that a victim's testimony alone is insufficient to support an award for emotional distress. Specifically, in its "Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act," 8 Fair Emp. Prac. Manual § 405:7091, 7097 (Jul. 7, 1992), the EEOC explicitly adopted the Eighth Circuit's holding that "[t]he plaintiff's own testimony may be solely sufficient to establish humiliation or mental distress" (*citing Williams v. Trans World Airlines,* 660 F.2d at 1273) (internal quotations omitted). Further, as an example, the EEOC cited *Muldrew v. Anheuser-Busch, Inc.*, 728 F.2d 989, 992-93 (8th Cir. 1984), a case where the court sustained a $52,644.80 emotional distress award based solely on the plaintiff's testimony of emotional injury.

Similarly, in its role as administrative adjudicator of federal employees' discrimination claims, the EEOC has held that a plaintiff's testimony, standing alone, may be sufficient to support an award for emotional injury:

> Finally, the Commission disagrees with the agency's suggestion that appellant should have provided statements from "objective third party witnesses" to sup-

> port his claim for damages. Appellant's claims for damages for loss of consortium or loss of enjoyment of family relationships may be outside the realm of third party observation.

Carpenter v. Glickman, 95 FEOR 3229 at XII 146 (EEOC 1995). Accordingly, to the extent that the court below believed its decision comported with the administrative construction of the EEOC, it was wrong.

Also in the name of the EEOC's policy statement, the court below assailed petitioners' proof of emotional injury because neither Mr. Brown nor Ms. Patterson presented evidence of any physical manifestations of the emotional harm they suffered.[4] *See* App. A at 20a ("The EEOC, as the primary enforcement mechanism against discrimination under Title VII, . . . [has] interpreted the 1991 Amendments allowing compensatory damages under Title VII to . . . require physical manifestations to recover for emotional harm."). Thus, not only did the court below require petitioners to present corroborating evidence of their emotional injury, it specifically required corroboration in the form of evidence of physical manifestations of emotional harm.

A requirement for proof of physical manifestations of emotional harm as a prerequisite for recovery, however, is nowhere to be found in the EEOC policy statement or in

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[4] While the court held that Mr. Brown did not testify "as to any manifestations of harm listed by the EEOC policy statement," App. A at 21a, and that as to Ms. Patterson "[t]he record contains none of the listed evidentiary factors in the EEOC policy statement," App. A at 24a, the court could only have been referring to the **physical manifestations** discussed in the policy statement. The record is replete with evidence that petitioners suffered emotional harm of the nature discussed by the EEOC. *See, e.g.,* Tr. 420 (Mr. Brown's testimony concerning his loss of self esteem); Tr. 422 (Mr. Brown's testimony concerning marital and familial strain); Tr. 97 (Ms. Patterson's testimony concerning her sleeplessness); Tr. 100-01 (Ms. Patterson's testimony concerning her marital and familial strain).

any circuit law. While the EEOC policy statement does state that "[t]he Commission will typically require medical evidence of emotional harm to seek damages for such harm **in conciliation negotiations**", 8 Fair Emp. Prac. Manual at 405:7097 (emphasis added), the policy statement hardly stands for the proposition that medical evidence is a prerequisite to recovery. To the contrary, the policy statement cites several circuit decisions in which emotional distress damages were awarded in the absence of medical evidence. *See, e.g., Cowan v. Prudential Ins. Co.*, 852 F.2d 688, 690-91 (2d Cir. 1988) (sustaining $15,000 emotional distress award on evidence of loss of self esteem and marital problems); *Muldrew v. Anheuser-Busch*, 728 F.2d at 992-93 (sustaining award in excess of $50,000 without medical evidence). *See also Miner v. City of Glens Falls*, 999 F.2d 655, 663 (2d Cir. 1993) (medical testimony is "neither required nor necessarily probative" in establishing emotional injury); *Johnson v. Hale*, 940 F.2d 1192, 1193 (9th Cir. 1991) ("No evidence of economic loss or medical evidence of mental or physical symptoms stemming from the humiliation need be submitted"); *Morgan v. Secretary of Housing and Urban Development*, 985 F.2d 1451, 1459 (10th Cir. 1993) ("Medical evidence concerning physical symptoms is not required" to prove emotional injury); *Bolden v. Southeastern Pennsylvania Transp. Authority*, 21 F.3d at 36 (medical evidence not required); *Carter v. Duncan-Huggins*, 727 F.2d at 1238 (plaintiff's testimony that she "felt isolated" and worked in an atmosphere of harassment "constitute[s] the stuff of which a claim for humiliation and emotional harm is composed.").

Title VII now includes a compensatory damages remedy for "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life and other nonpecuniary losses." *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1491 (1994). The EEOC has recognized that nothing in the statute suggests that this remedy is only available upon presentation of corroborating evidence of emotional

injury or evidence of physical manifestations of emotional harm. Yet in the name of deference to the EEOC, the court below vacated petitioners' emotional distress awards precisely on these grounds. Review by this Court is necessary to correct the lower court's erroneous construction of the EEOC's position on this matter and to give proper deference to the EEOC as the principal federal agency responsible for implementing Title VII.

4. The decision below is extraordinary, and extraordinarily wrong. In virtual isolation from its sister circuits, the court held that the victims' testimony concerning their emotional injuries was not "competent evidence" to support an emotional distress award. Similarly, the court below achieved lone eminence among the circuits when it held that proof of physical manifestations of emotional injury is necessary to support an award of damages for "emotional pain, suffering, inconvenience, mental anguish, [and] loss of enjoyment of life." § 1981a(b)(3). The significance of the decision below cannot be overstated: the court below did not simply vacate and remand the emotional injury awards as excessive; it held that absent corroborating evidence, or specific testimony concerning physical manifestations of emotional injury, a victim of discrimination is entitled only to nominal damages for the injury he or she suffered.

In imposing this heightened proof requirement upon victims of invidious discrimination, the court below has defied the teachings of this Court, isolated itself from the other circuits and ignored the EEOC's interpretation of the Civil Rights Act of 1991. Most significantly, however, by crafting a heightened evidentiary requirement for proof of emotional injury, the court below has done violence to the civil rights acts themselves. Regrettably, as this case demonstrates, for some people "[h]urt feelings, anger and frustration" caused by being referred to as a "nigger" and "porch monkey" and being subjected to a supervisor's bigotry remain "part of life." App. A at 22a. *See also*

N.Y. Times, Nov. 4, 1996, § A, at 1, col. 1 and § D, at 4, col. 6 (Texaco officials referring to black employees as "niggers," "orangutans," and "porch monkeys"). But it is precisely this "insidious and pervasive evil" that Congress has sought to eliminate through its passage of the civil rights laws. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). By ratcheting up evidentiary standards for victims of discrimination, the court below has simply created another impediment to eradication of an evil that continues to plague our nation to this day. Review by this Court is necessary to remove this impediment and allow Congress' efforts to have their full effect.

II. PUNITIVE DAMAGES ARE AVAILABLE AGAINST A CORPORATE EMPLOYER WITHOUT PROOF THAT OFFICERS OF THE COMPANY ACTED MALICIOUSLY

1. The court below vacated Mr. Brown's punitive damage award against Kennedy as excessive [5] and reversed outright both Mr. Brown's and Ms. Patterson's punitive damage awards against PHP Healthcare. App. A at 32a. Reasoning that "Kennedy was not a corporate officer of PHP Healthcare," App. A at 30a, and that "[t]he record is completely void of evidence showing that PHP Healthcare took part in any discriminatory conduct much less

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[5] The court held that the $150,000 punitive damage award against Kennedy was excessive in light of *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1598-99 (1996). Kennedy's conduct is at the extreme end of the reprehensibility scale, and, significantly, the $150,000 award is well below the statutory cap authorized under § 1981a(b)(3)(D). While obviously Congress did not intend the Title VII caps to limit damage awards under § 1981, certainly a § 1981 award that is beneath the applicable Title VII cap is reasonable. *See* Policy Guide on Compensatory and Punitive Damages Under 1991 Civil Rights Act, 8 Fair Emp. Prac. Manual at 405:7101 n.18 (because "[t]he sum of punitive damages, future pecuniary losses and nonpecuniary losses may not exceed the damage caps set forth in § 1981a(b)(3)[,] . . . punitive damage awards under § 1981a typically will not be 'grossly excessive' or 'shocking.'").

any 'malicious' or 'reckless' conduct," the court exonerated PHP Healthcare from any liability for punitive damages. App. A at 31a.

By requiring proof of malicious or reckless conduct of corporate officials, the court below has again distanced itself from the teachings of this Court and the law of its sister circuits. Review by this Court is necessary to conform the court below to the law universally applied in the other federal circuits.

In *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 392-93 (1982), this Court suggested that agency principles, and particularly *respondeat superior*, were appropriate doctrines to be applied in § 1981 cases. *See also id.*, 458 U.S. at 404 (O'Connor, J., concurring) ("nothing in the Court's opinion prevents the respondents from litigating the question of the employers' liability under § 1981 by attempting to prove the traditional elements of *respondeat superior*."). Similarly, the circuit courts have unanimously adopted agency principles in fixing liability, including liability for punitive damages, under § 1981. *See, e.g., Vance v. Southern Bell Tel. & Tel. Co.*, 863 F.2d 1503, 1512 (11th Cir. 1989) (sustaining imposition of punitive damage liability under *respondeat superior* in § 1981 case); *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417, 1422 (7th Cir. 1986) (sustaining award of punitive damages under *respondeat superior* in § 1981 case).

Under general principles of agency law, a corporate employer is vicariously liable for punitive damages brought about by the conduct of a managerial employee:

> In addition to liability arising from ratification and authorization, punitive damages also may be imposed, in the absence of proof of fault on the part of the corporation, when the wrongful actor is a managerial employee.

Mitchell v. Keith, 752 F.2d 385, 389 (9th Cir.), *cert. denied*, 472 U.S. 1028 (1985). In *Fitzgerald v. Moun-*

tain States Tel. & Tel. Co., 68 F.3d 1257, 1263 (10th Cir. 1995), the Tenth Circuit addressed the question of when punitive damages may be assessed against a corporation based on conduct of an employee. Citing to the *Restatement of Torts (Second)*, § 909 (1979), the court noted:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent, if, but only if, . . .
>
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment . . .

Id. 68 F.3d at 1263.

There is no dispute that Kennedy was employed in a managerial capacity by PHP Healthcare: as the project manager of the Fort Hood facility, he was the most senior PHP Healthcare employee at the facility and its chief administrative officer. Indeed, the court below held that "Kennedy's actions may be attributed to PHP Healthcare for purposes of compensatory damages, given his supervisory role as project manager." App. A at 30a. *See also Dias v. Sky Chefs, Inc.*, 919 F.2d 1370, 1375-76 (9th Cir. 1990), *vacated on other grounds*, 501 U.S. 1201 (1991) (multistate corporation's "General Manager, the highest ranking corporate officer in Portland," was a managerial agent for purposes of vicarious imposition of punitive damages).

Notwithstanding Kennedy's status as a managerial agent, the court below refused to hold PHP Healthcare vicariously liable for his malicious and reckless conduct. Rather, it required proof that PHP Healthcare "took part in [the] discriminatory conduct" or "knew or should have known of Kennedy's malicious or reckless conduct." App. A at 31a.[6]

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[6] The court below concluded that "there is nothing in the record which would show that PHP Healthcare had knowledge of Kennedy's malicious or reckless conduct, or authorized, ratified or ap-

In so holding, the court below has adopted a rule explicitly rejected by several circuits and implicitly rejected by others. Most directly, the Eighth Circuit in *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241, 1246 (8th Cir. 1983), rejected the corporate defendant's argument that it is "not appropriate to award punitive damages against a corporate defendant in the absence of evidence that the executive decision makers were racially motivated or biased." (Internal quotations omitted). Similarly, the Seventh Circuit in *Hunter v. Allis-Chalmers Corp.* held:

> [T]he deliberate act of [a managerial agent] is the corporation's deliberate act. Whether **his** superiors knew or should have known what he did is irrelevant.

797 F.2d at 1422 (emphasis original) (citation omitted).[7]

Several circuits have upheld the imposition of punitive damages against a corporate defendant under § 1981 merely upon proof that the wrongful actor was a supervisory employee, not a managerial employee. For example, in *Erebia v. Chrysler Plastic Products Corp.*, 772 F.2d 1250, 1260 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986), the Sixth Circuit sustained an award of punitive damages under § 1981 based solely on the conduct of supervisors without any discussion at all whether

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proved Kennedy's actions." App. A at 31a. However the district court found (and the court below recognized) that Ms. Patterson "contacted PHP Healthcare's headquarters to call attention to Kennedy's discriminatory actions" and that "Patterson's actions in contacting PHP Healthcare's headquarters . . . [was a] producing cause[] of her termination." App. B at 37a; App. at 7a.

[7] The closest support among the other circuits for the Fifth Circuit's rule is found in *Hamilton v. Svatik*, 779 F.2d 383, 389 (7th Cir. 1985), in which the court held that "[a] principal is liable for punitive damages for the discriminatory acts of her agent only if she knew of or ratified the acts." *See also Chicago v. Matchmaker Real Estate Sales Center, Inc.*, 982 F.2d 1086, 1100 (7th Cir. 1992) (following *Hamilton*). These cases are both housing discrimination cases, however, where the issue of "managerial agents" did not arise.

corporate officers of Chrysler were aware of or participated in the unlawful conduct. Similarly, in *Equal Employment Opportunity Commission v. Gaddis,* 733 F.2d 1373, 1380 (10th Cir. 1984), the Tenth Circuit sustained an award of punitive damages against the corporate defendant, holding that

> [a]n employer is liable under both Title VII and section 1981 "where the action complained of was that of a supervisor, authorized to hire, fire, discipline or promote . . ."

(Citation omitted). In *Rowlett v. Anheuser-Busch, Inc.,* 832 F.2d 194, 205-07 (1st Cir. 1987), a case cited in both the EEOC policy statement and the House Report accompanying the 1991 Civil Rights Act,[8] the court sustained the imposition of punitive damages against the corporate defendant on the basis of conduct by a supervisor and without any proof or discussion that corporate officers knew of or participated in the unlawful conduct.

By excising the "managerial agent" component from the agency law of vicarious liability for punitive damages, the court below has separated itself from the other circuits. Had this case arisen in any of several other federal circuits, Kennedy's status as a supervisory and managerial agent of PHP Healthcare would have been sufficient to hold PHP Healthcare vicariously liable for Kennedy's reprehensible conduct. Review by this Court is necessary to assure a uniform interpretation of the law of punitive damages under § 1981 throughout all the circuits.

2. The court below recognized that agency principles required PHP Healthcare to answer for Kennedy's unlawful conduct. *See* App. A at 30a ("We agree that Kennedy's actions may be attributed to PHP Healthcare *for purposes of compensatory damages,* given his supervisory role as project manager") (emphasis added). Nonetheless,

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[8] *See* H. Rep. No. 102-40(I), 102nd Cong., 1st Sess. (1991) *reprinted in* 1991 U.S.C.C.A.N. 549 at 612.

both with respect to § 1981 and Title VII, the court held that something more needed to be proven to attach liability for punitive damages to PHP Healthcare; *i.e.*, proof of malicious or reckless conduct of corporate officers. App. A at 31a.

As noted above, the circuit courts (other than the court below) have held that malicious or reckless conduct of a supervisor or manager is sufficient to attach punitive damage liability to a corporate defendant under § 1981. Although more limited, the existing case law under Title VII shows that not even this proof is necessary: if an individual's acts are sufficiently acts of the "employer" for purposes of imposing liability under Title VII, then the employer is liable for any damages that may be awarded. Nothing in the language of § 1981 suggests that Congress intended to create different standards of vicarious liability for compensatory and punitive damages. By creating this distinction, the court below has improperly limited the reach of the punitive damage amendments to Title VII. Review by this Court is necessary to address this significant question of federal law and correct the decision of the court below.

In addition to the traditional Title VII remedies available under § 2000e-5(g), § 1981a(a)(1) provides that a "complaining party may recover compensatory and punitive damages." Yet the only additional requirement imposed by the statute for an award of punitive damages is proof of "malice or reckless indifference to the federally protected right." § 1981a(b). The court below expressly found this evidence of malice in Kennedy's conduct, App. A at 28a, and thus all statutory elements for entitlement to an award of punitive damages are present. The court below could deny relief only by engrafting onto the statute a requirement that Congress did not enact; *i.e.*, by writing into the statute a requirement for proof of malice at the corporate level. In so doing, the court

below strayed well outside its proper judicial role and impermissibly invaded Congress' exclusive domain.

Section 1981a was enacted against Title VII's well-understood framework of employer liability:

> [I]f [an individual] serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing, or conditions of employment[,] . . . the individual operates as the alter ego of the employer, and the employer is liable for the unlawful practices of the individual without regard to whether the employer knew of the individual's conduct.

Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (internal quotations omitted), *citing Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989), *aff'd in pertinent part*, 900 F.2d 27 (4th Cir. 1990) (en banc). *See also Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990) (per Posner, J.) ("[t]he deliberate act of an employee acting within the scope of his authority is the act of the employer, for an employer, at least where it is a corporation, acts only through its agents."). There is no hint in the statutory language, or its legislative history, that Congress intended to modify this bedrock principle of employer liability in enacting the punitive damage provisions of § 1981a.

Almost without exception, the courts that have considered punitive damages under Title VII have followed this model of employer liability and assessed punitive damages without requiring proof of corporate officers' complicity. For example, in *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1347 and 1356 (7th Cir. 1995), the court held the corporate employer liable for punitive damages on the basis of conduct of a mid-level supervisor. Similarly, in *Preston v. Income Producing Management, Inc.*, 871 F. Supp. 411, 415 (D. Kan. 1994), the court rejected the argument that malicious conduct of corporate officers was required:

> It should be sufficient here to say that the price paid by a defendant for its conduct as an employer, through its store managers, is punitive damages.

Moreover, in *Woodyatt v. Bethlehem Steel Corp.*, 1996 U.S. Dist. LEXIS 12974 at *5 (E.D. Pa. Aug. 28, 1996), the court assessed punitive damages under Title VII specifically on the basis of subordinate managers' malice:

> It is not necessary, as Defendant argues, for the ultimate decision maker to have acted with an evil intent. [The decision maker] made his decision based on the opinion of the supervisors, and the evidence . . . supports a finding that at least two of the supervisors acted with malice or reckless indifference.

See also Hearn v. General Electric Co., 927 F. Supp. 1486, 1501 (M.D. Ala. 1996) (imposing punitive damage liability on basis of plant manager's malicious conduct); *Kimzey v. Wal-Mart Stores, Inc.*, 907 F. Supp. 1309, 1316 (W.D. Mo. 1995) (malicious conduct of supervisors resulted in punitive damage liability for corporation).

Only the Eleventh Circuit has joined the court below in finding this additional requirement of corporate-level malice. Specifically, in *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 491 (11th Cir. 1996), the court refused to award punitive damages in a sexual harassment case:

> [W]e also decline to hold that, in the instant circumstances, the state of mind of the harassing employees counts as the state of mind of Shoney's, the corporate employer, for punitive damages purposes.

Significantly, *Splunge* cited the decision of the court below as its principal authority. *Id.*

While *Splunge* is presumably limited to hostile work environment cases, nonetheless it shows that the aberrant construction of § 1981a adopted by the court below has gained currency in at least one other court. Several district courts, as well as the Seventh Circuit, have recog-

nized that punitive damages may be appropriate even without evidence of corporate officers' complicity. Review by this Court is necessary to resolve this split among the lower courts on this significant question concerning the availability of punitive damages under Title VII.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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November 8, 1996

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APPENDICES

APPENDIX A

[Filed July 25, 1996]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50319

DONNA PATTERSON; NICHOLAS BROWN,
Plaintiffs-Appellees,

and

MICHAEL L. ADAMS,
Plaintiff,

versus

P.H.P. HEALTHCARE CORPORATION; MARK KENNEDY,
Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Texas

Before DUHÉ, BARKSDALE, and DEMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

Nicholas Brown, Michael Adams[1] and Donna Patterson brought suit against PHP Healthcare Corporation and

[1] The district court entered partial summary judgment in this case and ordered that Michael Adams recover nothing from PHP Healthcare and Kennedy. Adams filed no appeal.

Mark Kennedy in state court alleging various employment discrimination and retaliation claims. PHP Healthcare and Kennedy removed the case to federal court pursuant to 28 U.S.C. § 1441(b). Brown, a black male, alleged that he was constructively discharged from his position as a mental health technician and discriminated against because of his race in violation of 42 U.S.C. § 1981.[2] Patterson, the head nurse at PHP Healthcare's Fort Hood facility, alleged violations of 42 U.S.C. § 2000e-3 for retaliatory discharge based on her opposition to Mark Kennedy's discriminatory hiring practices and Kennedy's discrimination against Brown.[3] After a bench trial, the district court entered judgment in favor of Brown and Patterson and awarded compensatory and punitive damages. For the forthcoming reasons, we affirm in part and reverse in part.

I.

On July 1, 1991, PHP Healthcare began providing psychiatric services under a fixed price contract for the United States Army personnel at the Darnell Army Community Hospital in Fort Hood, Texas. PHP Healthcare, a private corporation employing more than 500 employees, assembled the following people as the "core" staff for this new project in Fort Hood: the project manager,

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[2] Brown and Adams also alleged that PHP Healthcare and Kennedy retaliated against them for engaging in protected speech in violation of 42 U.S.C. § 1983. Brown, Adams and Patterson additionally alleged retaliatory discharge based on reports they made to PHP Healthcare's headquarters concerning fraudulent billing practices. The district court entered partial summary judgment in favor of PHP Healthcare and Kennedy on these claims. No appeal was taken.

[3] The district court dismissed Patterson's state law claims and her Title VII claims against Kennedy on motion for summary judgment. *See Grant v. Long Star Co.*, 21 F.3d 649, 651-52 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994) (holding that private employees are protected from individual Title VII liability). Patterson did not raise these issues on appeal, and consequently, we do not consider the propriety of the district court's order.

Mark Kennedy; the head nurse, Donna Patterson; and the psychologist, Dr. Michael Adams. Donna Hood worked as Kennedy's administrative assistant.

In this two day trial, the district court heard testimony from Kennedy, Patterson, Brown, Dr. Adams and four other witnesses, and determined the validity and credibility of their statements. The district court heard testimony that in late July 1991, less than one month after the facility opened, Kennedy met individually with each of his black employees to discuss a complaint that had been filed with the EEOC. Patterson testified that Kennedy, who is Caucasian, warned his black employees that he would not tolerate any EEOC complaints filed against PHP Healthcare. After the meetings, Kennedy told Patterson that "these stupid niggers need to understand I carry a big stick." At trial, Kennedy could not recall the reason for these meetings and did not refute Patterson's testimony.

Brown and Patterson testified that Kennedy scheduled black mental health technicians almost exclusively to the less desirable night shift. Further, Brown was forced to wait six months before receiving his shift differential upon becoming a full-time employee, while PHP Healthcare promptly resolved a similar problem with a white employee after one month. The district court also heard testimony that a white technician, James Tzcap, received a promotion to mental health technician supervisor while Brown was overlooked for the job.

In March 1992, a meeting was held in which black employees complained about being assigned to the less desirable night shift. Dr. Adams and Patterson testified that, after this meeting, Kennedy told Patterson that "not another nigger is to be hired." The district court also heard testimony from Dr. Adams, Patterson and Janet Berry (a current employee of PHP Healthcare) that Kennedy regularly referred to black employees as "porch monkeys," and "niggers" and considered black employees

to be "shiftless" and "lazy." Kennedy did not dispute using the term "porch monkey," however, he testified that he was only joking when he used the term and attributed his use of the term to a joke told by Patterson. He also denied ever referring to his employees as "niggers."

In August 1992, Patterson hired another black mental health technician, Eddie Harris. A few days later, Kennedy left for PHP headquarters for a meeting. When he returned on August 17, 1992, Kennedy fired Patterson. Appellants PHP Healthcare and Kennedy contend that Patterson was fired because she took a three hour lunch while Kennedy was at corporate headquarters. Appellants also argue that Patterson reported for work late on August 10 and that she did not show up for work on August 11. Because of her absence on August 11, a patient escaped from the hospital.

After her termination, Patterson filed a claim with the Texas Employment Commission. Kennedy submitted a document at the T.E.C. hearing which listed PHP Healthcare's reasons for firing Patterson. Kennedy admittedly created this document and back-dated it for use at the T.E.C. hearing. The document included the above details of Patterson's alleged inappropriate conduct. PHP Healthcare and Kennedy contend that the document, in concert with Patterson's inability to work constructively with Hood (Kennedy's assistant), her regular tardiness in March, April and May 1992, and Patterson's insubordinate attempts to assist Brown, were valid reasons to terminate her employment.

Patterson never saw this document until the T.E.C. hearings because Kennedy created it expressly for the hearing. Further, one month before her termination, Patterson had received favorable marks in all categories on her employment evaluation. PHP Healthcare's employment manual also required two verbal warnings and a written warning prior to termination. Patterson received no such reprimands.

PHP Healthcare and Kennedy attempted to identify problems with Brown's performance as well. Brown received numerous disciplinary actions, including verbal counseling from Patterson about his tardiness and his tendency to call in sick before and after scheduled days off. Patterson also counseled Brown about agreeing to work for other technicians and then failing to show up. Brown received a written warning about his attendance problems in June 1992 and was placed on probation in July.

However, Kennedy threatened to impose disciplinary action on Brown under highly unusual circumstances involving falsified memos and other documents based on unexcused absences. Brown testified that Kennedy twice threatened him with disciplinary actions based on falsified memos and reports. Patterson corroborated Brown's testimony and Kennedy did not refute his use of questionable documentation of Brown's conduct. After Patterson was fired, the new head nurse, Becky Simpson, told Brown that she had no interest in hearing from any mental health technician except for the white technician, James Tzcap.

Based on this ongoing array of work related problems, Brown tendered his resignation on September 1, 1992, effective September 4, 1992. On September 1, Brown received a call from John Bucur, a PHP Healthcare official from the corporate headquarters, who arranged a telephone conference with Brown and Kennedy later that afternoon. In this meeting, Brown explained his problems with the work environment. Bucur assured Brown that the work environment would change. Later that afternoon, Brown asked to withdraw his resignation. Kennedy told him that he was no longer needed at PHP Healthcare and that his position had been filled. At the time of trial Kennedy was no longer an employee of PHP Healthcare having been terminated on April 27, 1994. Kennedy was terminated from PHP Healthcare after he gave the primary part of his deposition in this lawsuit.

The district court entered the following findings of fact and conclusions of law in favor of Brown and Patterson: The district court found that Kennedy repeatedly and routinely used racial slurs, including "porch monkey" and "nigger," and used these terms in referring to Brown as well as other black employees. When black employees were terminated or left PHP Healthcare, Kennedy routinely replaced them with white employees.

The district court also found that PHP Healthcare and Kennedy discriminated against Brown on the basis of his race by limiting his work schedule, assigning him certain menial duties that were not performed by white employees, denying him an opportunity for promotion, falsifying documents in order to take disciplinary actions against him, and by constructively terminating him. With respect to Brown's resignation, the district court found that Brown withdrew his resignation in a timely manner after PHP Healthcare's headquarters convinced him that the hostile work environment would be improved. Kennedy then refused to allow Brown to withdraw the resignation which constituted a constructive discharge. Essentially, Brown was retaliated against and terminated for his complaints of racial problems at the hospital. He was replaced by a white employee. The district court found the reasons given by PHP Healthcare and Kennedy for Brown's dismissal to be pretexts for racial discrimination.

The district court entered a final judgment in favor of Brown against PHP Healthcare and Kennedy holding them jointly and severally liable for intentional discrimination in violation of 42 U.S.C. § 1981. The district court awarded damages of $22,648 in lost income and benefits,[4] $40,000 for emotional damage and $150,000

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[4] Brown testified that he worked 50 hours per week for PHP Healthcare. Of those 50 hours, 25 hours were usually from night and weekend shifts which earned an additional eight percent shift differential. Therefore, the district court arrived at $22,648 by

in punitive damages to Brown. The court based its award of punitive damages on the willful and malicious discrimination evidenced in this case.

As to Patterson, the district court found that she contacted PHP Healthcare's headquarters to call attention to Kennedy's discriminatory actions. In March 1992, after meeting with each black employee about complaints of race discrimination, Kennedy told Patterson that "not another nigger is to be hired." In August 1992, Patterson needed another mental health technician and hired a black employee, Eddie Harris.

Patterson's actions in contacting PHP Healthcare's headquarters and in hiring another black employee were the producing causes of her termination. Kennedy prepared a document setting forth his reasons for terminating Patterson; however, the document was prepared after the termination and back-dated by Kennedy and Dr. Chaparala, the medical director. Kennedy then lied about using the document to terminate Patterson when he testified before the Texas Employment Commission. Based on these facts, the district court found that Patterson was terminated because she hired a black technician in contravention to an illegal directive given to her by Kennedy.

The district court awarded lost income and benefits of $40,000,[5] $150,000 for emotional damage and pain and suffering, and $150,000 in punitive damages against PHP Healthcare based on Patterson's 42 U.S.C. § 2000e-3 claim. The district court further found that both Brown

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calculating (25 hours x $6.19 per hour = $154.75) + (25 hours x $6.69 per hour = $167.25) = $322 weekly wage and factoring on various earnings in mitigation.

[5] Patterson testified without dispute that her actual lost wages were in excess of $40,000. She explained that she was a salaried employee of PHP Healthcare and received $36,650 per year or approximately $17.68 per hour.

and Patterson were entitled to attorneys' fees pursuant to 42 U.S.C. § 1988.

II.

Appellants PHP Healthcare and Kennedy raise a number of arguments attacking the district court's legal conclusions based on improper burden shifting and erroneous legal cause findings under *McDonnell Douglas.*[6] PHP Healthcare and Kennedy first argue that the district court erred in finding that Kennedy's racial slurs constituted direct evidence of discrimination. Next, appellants contend that the district court erred in finding a nexus between Patterson's actions opposing Kennedy's discrimination and hiring practices and her termination under 42 U.S.C. § 2000e-3. Third, appellants maintain that the district court failed to specially find facts as required by FED. R. CIV. P. 52(a). Fourth, PHP Healthcare and Kennedy contend that the district court erred in finding that appellants' acts of racial discrimination affected the terms and conditions of Brown's employment in violation of 42 U.S.C. § 1981. Finally, appellants argue that the district court erred in finding that Brown was constructively discharged.

We address these arguments together. After a case has been fully tried on the merits, the *McDonnell Douglas*[7] burden shifting analysis ceases to be of import to an appellate court. *Haun v. Ideal Indus., Inc.*, 81 F.3d 541, 546 (5th Cir. 1996); *Molnar v. Ebasco Constructors, Inc.*, 986 F.2d 115, 118 (5th Cir. 1993). Instead, our inquiry becomes whether the record contains sufficient evidence to support the conclusions reached by the trier

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[6] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

[7] In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Supreme Court set out the burden shifting ritual used in cases brought under Title VII.

of fact. *Haun*, 81 F.3d at 546; *Molnar*, 986 F.2d at 118.

In making this assessment, the district court's factual findings are examined for clear error pursuant to FED. R. CIV. P. 52(a). *See EEOC v. Clear Lake Dodge*, 60 F.3d 1146, 1151 (5th Cir. 1995). Under this standard, we reverse a district court's judgment based on erroneous fact findings only when, after weighing the evidence, we are definitely and firmly convinced that a district court made a mistake. *Id.* "Where the court's finding is based on its decision to credit the testimony of one witness over that of another, 'that finding, if not internally inconsistent, can virtually never be clear error.'" *Schlesinger v. Herzog*, 2 F.3d 135, 139 (5th Cir. 1993) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)). After a thorough review of the record, we find ample evidence supporting the district court's findings as to liability and, therefore, this case presents no clear error in that regard.

III.

PHP Healthcare and Kennedy also contend that the district court erred in allowing Brown to amend his pretrial order to raise a hostile work environment claim. Brown points out that he received no monetary award for his hostile work environment claim and, in any event, evidence of PHP Healthcare's hostile work environment would have been admitted in support of Brown's intentional race discrimination claim under § 1981.

The Federal Rules of Civil Procedure allow a district court to freely grant leave to amend when justice so requires. FED. R. CIV. P. 15(a). We review the district court's decision to grant or to deny leave to amend for abuse of discretion. *Engstrom v. First Nat. Bank of Eagle Lake*, 47 F.3d 1459, 1464 (5th Cir.), *cert. denied*, 116 S. Ct. 75 (1995). In this case, permitting Brown's amendment did not surprise, prejudice, or delay the appellants' defense. Brown's 42 U.S.C. § 1981 claim should

have alerted PHP Healthcare and Kennedy to the type of evidence that would be elicited in this case. Here, Brown's hostile work environment claim is not so different from his intentional discrimination claim so as to surprise PHP Healthcare or Kennedy and prejudice their defense. Further, the district court did not award damages based on the hostile work environment claim.

PHP Healthcare and Kennedy failed to present evidence demonstrating that the district court's decision to grant Brown's amendment prejudiced their defense of this case. As such, we find no abuse of discretion in the district court's decision to grant leave to amend.

IV.

PHP Healthcare and Kennedy next challenge the district court's award of back pay and reinstatement to Brown based on evidence of Brown's failure to disclose his prior criminal conviction. The Supreme Court recently set out the applicable standard for determining whether, and to what extent, after-acquired evidence affects a damage award under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* *See McKennon v. Nashville Banner Pub. Co.*, 115 S. Ct. 879 (1995). In *McKennon*, the Court held that evidence of employee wrongdoing after termination does not immunize an employer from liability under Title VII; the wrongdoing, however, may affect the remedy available to the employee. *Id.* at 886-887. In assessing the effect of after-acquired evidence, *McKennon* explains:

> Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.

Id. at 886-887; *and see Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1108 (5th Cir. 1995) (citing same).

PHP Healthcare's employment application asked, "[h]ave you ever pleaded guilty to or been convicted of any criminal offense, excluding minor traffic citations?" Brown answered no. The application also asked whether Brown was currently serving probation or any deferred adjudication for a criminal offense. Again, Brown answered no. PHP Healthcare's Vice President of Human Resources, John Bucur, testified that a prior conviction would not necessarily bar an applicant from working at PHP Healthcare. Bucur stated, however, that application fraud would result in that employee's immediate dismissal.

Brown admits that he was convicted of burglary in 1982 and sentenced to ten years probation. Brown, however, testified that his probation officer told him that once he completed the probation and paid restitution, his conviction would be expunged. Further, both Patterson and Brown testified that Kennedy knew of Brown's prior conviction when the trio worked together at the Greenleaf Center. The district court made fact findings in support of Brown's testimony. The district court believed Brown's testimony that his probation officer told him that it was unnecessary to notify employers of an expunged conviction. Consequently, the district court found that Brown truthfully completed his employment application. Based on Patterson's and Brown's testimony, the district court also found that PHP Healthcare and Kennedy knew about Brown's prior conviction. Finally, the district court found that PHP Healthcare would not have immediately terminated Brown even if they had not known of the prior conviction. As such, the district court concluded that PHP Healthcare failed to establish that "the wrongdoing was of such severity that [Brown] in fact would have been terminated on those grounds alone if [PHP Healthcare] had known of it at the time of the discharge. *McKennon*, 115 S. Ct. at 886-887.

In determining whether the district court erred in finding that Brown would not have been terminated based on his submission of a false employment application, we are again faced with a clear error review which turns on the district court's credibility assessments. After reviewing the record as a whole, including the testimony of Patterson, Brown, Kennedy and Bucur, we defer to the findings of the district court. Even if PHP Healthcare did not have imputed knowledge of Brown's prior conviction, we are not convinced that Brown's failure to include his 10 year-old conviction on his employment application was so severe that PHP Healthcare would have terminated him based on this after-acquired knowledge. The district court's decision to award back pay and reinstatement does not leave us with a firm and definite conviction that a mistake has been made and, as such, we find no clear error.

V.

Next, PHP Healthcare and Kennedy argue that the district court committed clear error in finding that Patterson and Brown mitigated their damages. *Sellers v. Delgado College*, 902 F.2d 1189, 1193 (5th Cir.) (*Sellers III*), *cert. denied*, 498 U.S. 987 (1990) (recognizing that successful Title VII claimants have statutory duty under 42 U.S.C. § 2000e-5(g) to mitigate damages). We recognize that no such statutory duty exists to mitigate damages under 42 U.S.C. § 1981. Nevertheless, we are guided by the statutory duty to mitigate damages under § 2000e-5(g) based on the nature of the equitable relief sought by the claimant. *See Whiting v. Jackson State Univ.*, 616 F.2d 116, 122 n.3 (5th Cir. 1980) ("No chameleon-like change in the nature of the relief is experienced simply because it is sought under sister provisions in the federal statutes.").

Further, the Supreme Court has recognized that the duty to mitgate damages, "rooted in an ancient principle of law, requires the claimant to use reasonable diligence

in finding other suitable employment." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 & n.15 (1982) (footnote omitted). Because an award of back pay is an equitable remedy designed to make the injured party whole, we are persuaded that an injured party has a duty under both § 1981 and Title VII to use reasonable diligence to attain substantially similar employment and, thereby, mitigate damages. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (recognizing that " 'the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.' ") (quoting H.R. REP. No. 92-238, at 19 (1971)). As such, we adopt the statutory requirement to exercise reasonable diligence to attain substantially similar employment as a prerequisite to obtaining back pay under § 1981.

In the present case, no party disputes that Brown attained substantially equivalent employment. Instead, PHP Healthcare and Kennedy argue that Brown failed to exercise reasonable diligence to maintain such comparable employment and should not receive back pay for the period after his involuntary termination of the substantially similar employment. We agree.

The Supreme Court requires successful Title VII claimants to use "reasonable diligence" to obtain "substantially equivalent" employment. *Ford Motor Co.*, 458 U.S. at 232. The claimant must exercise reasonable diligence in both seeking and maintaining substantially equivalent employment in order to effectuate the reasonable diligence requirement. *See Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1277 (4th Cir. 1985) (holding that forcing the Title VII defendants to pay for the claimant's misconduct in her subsequent employment is not properly related to the objective of the back pay requirements). Substantially equivalent employment has been defined as " 'employment which affords virtually identical

promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from which the Title VII claimant has been discriminatorily terminated.'" *Sellers III*, 902 F.2d at 1193 (quoting *Sellers v. Delgado College*, 839 F.2d 1132, 1138 (5th Cir. 1989) (*Sellers II*)).

The Fourth Circuit explained that a Title VII claimant has a duty to exercise reasonable diligence to maintain subsequent employment when that employment is substantially similar to the claimant's prior position. *Brady*, 753 F.2d at 1277. This duty includes an obligation "to make reasonable and good faith efforts to maintain that job once accepted." *Id.* We find this reasoning persuasive. By adopting a requirement to use "reasonable and good faith" effort to maintain employment, reasonable diligence becomes a two part test. First, the claimant must exercise reasonable diligence in obtaining substantially similar employment. *Ford Motor Co.*, 458 U.S. at 232; *and see Sellers III*, 902 F.2d at 1193. Second, in order to give effect to the statutory requirement to use reasonable diligence, it necessarily follows that the claimant must also use reasonable diligence in maintaining that substantially similar employment. *Brady*, 753 F.2d at 1277.

In this case, the district court found that Brown was constructively terminated from PHP Healthcare on September 1, 1992. Brown began working for Metroplex, another mental Healthcare provider, on September 8, 1992. Brown was then terminated from Metroplex on April 14, 1993. Kim Henry, the director of nursing at Metroplex, testified that Brown was fired for excessive absences, making personal phone calls and for his conflicts with another staff member. Brown concedes that he was involuntarily terminated from his job as a mental health technician for Metroplex.

We review the district court's determination of whether a claimant used reasonable diligence in attaining and maintaining substantially similar employment as a finding of

fact subject to reversal for clear error. FED. R. CIV. P. 52(a); *Rhodes v. Guiberson Oil Tools*, 82 F.3d 615, 621 (5th Cir. 1996) (en banc). As such, if the district court's findings are plausible in light of the evidence presented, we may not reverse its decision even if we would have reached a different conclusion. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

Here, the district court's damage award included back pay[8] from the date Brown was terminated from Metroplex, April 14, 1993, through December 1993.[9] While we recognize the remedial purposes of this statute generally permit back pay relief in all but "special circum-

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[8] "Back pay" commonly refers to the wages and other benefits that an employee would have earned if the unlawful event that affected the employee's job related compensation had not occurred. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). On the other hand, "front pay" is an equitable remedy referring to future lost earnings. Front pay is usually invoked when reinstatement is impracticable and is calculated from the date of judgment to age 70, or the normal retirement age, and should reflect earnings in mitigation of damages. *See* J. Hardin Marion, *Legal and Equitable Remedies Under the Age Discrimination in Employment Act*, 45 MD. L. REV. 298, 330-334 (1986).

[9] When calculating back pay damages, 42 U.S.C. § 2000e-5(g)(1) (1994) provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. *Back pay liabiilty shall not accrue from a date more than two years prior to the filing of a charge with the Commission.* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(Emphasis added).

stances," this case presents such a circumstance.[10] Brown was directly responsible for his loss of employment with Metroplex. The record indicates that Brown was fired from Metroplex on April 14, 1993, because of excessive absences, excessive use of the company phone for personal phone calls and for his conflicts with another staff member. Brown presented no evidence disputing the reasons given for his termination. Consequently, we hold that the district court's back pay assessment was clearly erroneous. We hold that a § 1981 claimant who attains employment substantially equivalent to the employment from which the claimant was unlawfully discharged has a duty "to make reasonable and good faith efforts to maintain that job once accepted." *Brady*, 753 F.2d at 1277. Brown breached this duty by acting in such a manner that caused his involuntary termination from Metroplex. By failing to make a reasonable and good faith effort to keep his job at Metroplex, Brown effectively removed himself from the job market for purposes of receiving back pay. *See id.; Ford Motor Co.*, 458 U.S. at 231-232. Therefore, we vacate the district court's back pay award to Brown with respect to the period after his involuntary termination and remand for a new damage determination in light of our decision.

PHP Healthcare and Kennedy raise a similar argument contending that back pay was improperly awarded to Patterson under Title VII. To meet their burden of showing Patterson failed to mitigate her damages, PHP Healthcare and Kennedy must show that substantially equivalent work was available and that Patterson did not exercise reasonable diligence in attaining that employment. *See Sellers III*, 902 F.2d at 1193. After reviewing the record, we hold that the district court committed no clear error in finding that Patterson made a reasonable effort to mitigate her damages.

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[10] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) (recognizing that the statutory requirement to award back pay does not automatically attach in all circumstances).

Upon her discharge from PHP Healthcare, Patterson did take a job at Metroplex, but it was only part-time and lasted one month. Thereafter, Patterson testified that she attempted to attain employment but was unsuccessful. She finally got a job at the Huntsville prison working with psychiatric prisoners. Patterson testified that she worked in Huntsville for three months and then transferred to the Houston unit. Patterson worked in Houston for over one year before quitting and moving back to Gatesville, Texas, to live with her family. PHP Healthcare and Kennedy offered no evidence to show that substantially equivalent work was available nor did they show that Patterson failed to use reasonable diligence to attain substantially similar employment. Further, Patterson voluntarily resigned from her post-PHP Healthcare jobs. Unlike Brown, no evidence exists to show that Patterson breached her duty to mitigate damages. Therefore, we hold that the district court committed no clear error with respect to Patterson's back pay award.

VI.

Next, PHP Healthcare and Kennedy argue that the district court committed clear error in awarding $40,000 to Brown under 42 U.S.C. § 1981 and $150,000 to Patterson under Title VII for emotional damage and mental pain and suffering.

A. Section 1981—Emotional Harm.

We have recognized that emotional harm may be recoverable under § 1981. *Gore v. Turner,* 563 F.2d 159, 164 (5th Cir. 1977); *and see Johnson,* 421 U.S. at 460, 95 S. Ct. at 1720. Our standard of review for awards based on intangible harms such as mental anguish is deferential to the fact finder because "the harm is subjective and evaluating it depends considerably on the demeanor of witnesses." 1 HENRY H. PERRITT, JR., CIVIL RIGHTS IN THE WORKPLACE § 4.6, at 245 (2d ed. 1995); *see also Thompson v. San Antonio Retail Ass'n,* 682 F.2d 509, 513 (5th Cir. 1982).

Although we generally defer to the fact finder in determining intangible harms, an award is warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury. *Gore*, 563 F.2d at 164. The Supreme Court has also required that compensatory damages such as emotional harm caused by the deprivation of constitutional rights may be awarded only when claimants submit proof of actual injury.[11] *Carey v. Piphus*, 435 U.S. 247, 255-56, 98 S. Ct. 1042, 1048 (1978). Therefore, a claimant must present testimony and/or other evidence to show the nature and extent of emotional harm caused by the alleged violation. In *Carey*, the Court stated:

> We use the term "distress" to include mental suffering or emotional anguish. Although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an *award of damages must be supported by competent evidence concerning the injury.*

Carey, 435 U.S. at 264 n.20, 98 S. Ct. at 1052 n.20 (emphasis added). A number of our sister circuits have recognized that a claimant's testimony alone may not be sufficient to support anything more than a nominal damage award. *See Fitzgerald v. Mountain States Telephone and Telegraph Co.*, 68 F.3d 1257, 1265 (10th Cir. 1995) (remanding an emotional damage award of $250,000 per plaintiff as clearly excessive when the award was based solely on the testimony of the plaintiffs; no physicians or psychologists testified and plaintiffs continued to work in their chosen fields.); *Gunby v. Pennsylvania Electric*

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[11] We have noted that while *Carey* refers to damage awards under 42 U.S.C. § 1983, "it is clear from the opinion as a whole that the Court's reasoning was not confined to § 1983." *Johnson v. IRS*, 700 F.2d 971, 977 n.11 (5th Cir. 1983). As a result, we apply the reasoning of *Carey* to cases involving federal claims for emotional harm.

Co., 840 F.2d 1108, 1121 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989) (reversing a § 1981 emotional distress award for $15,000 based on the lack of evidence to support such an award); *Erebia v. Crysler Plastic Prod. Corp.*, 772 F.2d 1250, 1259 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986) (reversing a § 1981 emotional damage award of $10,000 and remanding with instructions to award nominal damages because plaintiff offered only his own testimony); *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503, (11th Cir. 1989), *cert. denied*, 115 S. Ct. 1110 (1995) (affirming the district court's finding that the jury's award of $500,000 for emotional distress was grossly excessive when based solely on plaintiff's testimony that her hostile work environment caused her mental distress).

In many instances, corroborating testimony and evidence of medical or psychological treatment have been relied upon to support an award of emotional harm or mental anguish. *See Rowlett v. Anheuser-Busch*, 832 F.2d 194, 204-05 (1st Cir. 1987) (affirming § 1981 emotional damage award of $123,000 based on plaintiff's testimony and testimony from psychiatrist); *Cowan v. Prudential Ins. Co. of America*, 852 F.2d 688, 690-91 (2d Cir. 1988) (affirming § 1981 emotional damage award of $15,000 based on testimony of plaintiff, his wife and co-workers about the stress, humiliation and emotional distress suffered); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 922 (8th Cir. 1986) (affirming § 1981 damage award of $400,000 based on testimony of plaintiff and other witnesses). For example, in *Rowlett v. Anheuser-Busch, Inc.*, the First Circuit affirmed an emotional distress award of $123,000 to a black employee under § 1981 based on plaintiff's testimony that he was under continuous stress over a seven year period, he never received the proper training promised by management, he feared that he would make a mistake and be discharged because of his lack of training, and, after his discharge, he was unemployed and suffered emotional problems. *Rowlett*,

832 F.2d at 204-205. Rowlett also presented expert testimony of a psychiatrist who explained that he suffered from symptoms of anxiety, stress, and some depression for which he was treated with an antidepressant. *Id.* at 204. The court then held that "Rowlett's testimony, in combination with that of the psychiatrist and with the jury's common sense judgment of the emotional complications that would accompany the intentional discrimination Rowlett suffered, provides an adequate basis for the portion of the compensatory damage award attributable to emotional distress." *Id.*

The EEOC, as the primary enforcement mechanism against discrimination under Title VII, apparently recognized this trend in case law and interpreted the 1991 Amendments allowing compensatory damages under Title VII to similarly require physical manifestations to recover for emotional harm. EEOC POLICY GUIDANCE No. 915.002 § II(A)(2), at 10 (July 14, 1992). The Commission's position statement noted that "[c]ases awarding compensatory and punitive damages under other civil rights statutes will be used as guidance in analyzing the availability of damages under § 1981a. Section 1981 case are particularly useful because Congress treated the § 1981a damage provisions as an amendment to § 1981." *Id.* at 10 n.13. The Commission then explained its position on the availability of intangible injury under § 1981a as follows:

> Damages are available for the intangible injuries of emotional harm such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. Other nonpecuniary losses could include injury to professional standing, injury to character and reputation, injury to credit standing, loss of health, and any other nonpecuniary losses that are incurred as a result of the discriminatory conduct. Nonpecuniary losses for emotional harm are more difficult to prove than pecuniary losses.

> *Emotional harm will not be presumed simply because the complaining party is a victim of discrimination.*[] *The existence, nature, and severity of emotional harm must be proved.* Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown. Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss, or headaches . . . . The Commission will typically require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations.

Id. at 10-12 (footnotes omitted) (emphasis added).

In the instant case, the district court awarded $40,000 for emotional distress to Brown based solely on his testimony and the discriminatory conduct forming the basis of this lawsuit. Brown testified that he felt "frustrated" and "real bad" for being judged by the color of his skin. Brown explained that the work environment was "unbearable" and was "tearing my self-esteem down." Brown also stated that it "hurt" and made him "angry" and "paranoid" to know that his supervisor referred to Brown as a "porch monkey" or a "nigger" and generally thought that he was inferior to white employees. This testimony is the only evidence submitted by Brown in support of his emotional distress claim.

After a complete review of the record, we hold that Brown's testimony of mental distress is insufficient to support anything more than a nominal damage award. While the district court could infer that being referred to as a "porch monkey" and a "nigger" would cause one emotional distress, Brown has not presented evidence with the specificity required by *Carey* nor has Brown testified as to any manifestations of harm listed by the EEOC policy statement. *See* EEOC POLICY GUIDANCE NO. 915.002 § II(A)(2), at 10-11. Brown presented no corroborating

testimony nor did he offer expert medical or psychological evidence of damages caused by his alleged distress. No evidence suggests that Brown suffered from sleeplessness, anxiety or depression. Furthermore, immediately after his constructive discharge from PHP Healthcare, Brown obtained employment at Metroplex for a higher hourly wage rate than he received at PHP Healthcare.

In order to establish intangible loss, we recognize that *Carey* requires a degree of specificity which may include corroborating testimony or medical or psychological evidence in support of the damage award. *Carey*, 435 U.S. at 264, 98 S. Ct. at 1052. Hurt feelings, anger and frustration are part of life. Unless the cause of action manifests some specific discernable injury to the claimant's emotional state, we cannot say that the specificity requirement of *Carey* has been satisfied. We find no support for the district court's emotional damage award in this record. Consequently, based on the above reasoning, we hold that the district court abused its discretion in awarding emotional distress damages to Brown on his § 1981 claim. We vacate the district court's $40,000 emotional distress award as to Brown and remand the case with instructions for the district court to award nominal damages.

B. Title VII—Emotional Harm

For purposes of Title VII, § 102 of the Civil Rights Act of 1991 significantly expanded the available remedies for plaintiffs subjected to discrimination under Title VII. 42 U.S.C. § 1981a; *and see Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1490-1491 (1994). Under this section, "a Title VII plaintiff who wins a back pay award may also seek compensatory damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.'" *Landgraf*, 114 S. Ct. at 1491 (quoting 42 U.S.C. § 1981a(b)(3)). As such, both § 1981

and Title VII permit awards for intangible loss such as mental anguish or emotional distress.

Nothing in the 1991 Amendments to Title VII suggests that we should analyze claims for emotional distress under Title VII using different guidelines than those explained above for § 1981 emotional distress claims.[12] Furthermore, Congress treated the § 1981a compensatory and punitive damage provisions as amendments to § 1981. The legislative history of the 1991 Amendments to Title VII also shows that Congress sought to unify the law for employment discrimination cases. H.R. REP. No. 102-40 (II), 102d Cong., 1st Sess. at 24 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717. As such, we see no reason to frustrate Congressional intent by fashioning different rules for § 1981 and Title VII claims. Consequently, we read *Carey* to require a plaintiff to present the same level of competent evidence under a Title VII emotional distress claim as is required to sustain a finding for emotional distress under §§ 1981 and 1983. *Carey*, 435 U.S. at 255-56, 98 S. Ct. at 1048.

We again review the district court's emotional damage award for abuse of discretion. The district court awarded Patterson $150,000 for emotional damage, and mental pain and suffering. Again, no testimony was presented to show any manifestations of harm listed by the EEOC policy statement. Patterson presented no evidence that she was subjected to sexist or racist comments nor did she testify that she was subjected to a hostile work environment. Instead, Patterson testified that she was terminated by Kennedy for insubordination for hiring another black employee. She also explained that Kennedy created and back-dated a document for use at her T.E.C. hearings in order to challenge her application for unemployment. Patterson also testified that her retaliatory firing emotionally scarred her and resulted in unemployment for

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[12] We also recognize that nothing in the statute suggests that the same standards apply.

almost one year. Patterson explained that she worked in a narrow field as a psychiatric nurse and could not easily attain employment due to the limited number of facilities.

Apparently, the district court based its emotional harm award on testimony that Patterson suffered mental anguish during her unemployment, that she endured a great deal of familial discord arising from her acceptance of other jobs in Huntsville and Houston because she was forced to leave her children in the Gatesville area, and that the firing and subsequent moves to Huntsville and Houston to obtain work caused mental distress because she was separated from her children. Obviously, the retaliatory discharge caused a substantial disruption in Patterson's daily routine. However, this record is void of sufficient competent evidence to support anything more than nominal damages under *Carey*. *Carey*, 435 U.S. at 255-56, 98 S. Ct. at 1048.

The record contains none of the listed evidentiary factors in the EEOC policy statement. *See* EEOC POLICY GUIDANCE No. 915.002 at 10-11. No corroborating testimony was offered to support Patterson's testimony. No evidence suggests that Patterson was humiliated or subjected to any kind of hostile work environment. Further, no expert medical or psychological evidence exists to support a claim for emotional harm. No proof of actual injury exists in this case. Because Patterson failed to present sufficient competent testimony and/or other evidence to demonstrate the nature and extent of emotional harm caused by her unlawful termination, we hold that the district court abused its discretion in awarding her $150,000 for emotional distress. As we explained above, *Carey* teaches us that the an award of damages for "distress" "*must be supported by competent evidence concerning the injury*." *Carey*, 435 U.S. at 264 n.20, 98 S. Ct. at 1052 n.20 (emphasis added). Patterson's testimony alone does not meet this threshold. We therefore vacate the district court's Title VII emotional distress award and

remand to the district court with instructions to award nominal damages for Patterson's emotional distress.

VII.

Appellants PHP Healthcare and Kennedy also argue that the district court committed clear error by awarding punitive damages to Brown under 42 U.S.C. § 1981 and to Patterson under 42 U.S.C. § 1981a. A party who establishes a cause of action under 42 U.S.C. § 1981 may be entitled to punitive damages "under certain circumstances." *Johnson v. Railway Express Agency*, 421 U.S. 454, 460, 95 S. Ct. 1716, 1720 (1975). The general rule in this circuit permits a punitive damage award against a § 1981 defendant when the defendant acts willfully or with gross disregard for the plaintiff's rights. *See Jones v. Western Geophysical Co.*, 761 F.2d 1158, 1162 (5th Cir. 1985).[13] In *Jones*, we also recognized this characterization to be one of malice. *Id.* (citing *Clairborne v. Illinois Central R.R.*, 583 F.2d 143, 154 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979)).

Punitive damages were unavailable to Title VII plaintiffs until the enactment of the 1991 Amendments to the Civil Rights Act of 1964, 42 U.S.C. § 1981a. Congress's primary concern with enacting punitive damages under § 1981a(b)(1) was to unify the law under Title VII. H.R. REP. No. 102-40 (II), 102d Cong., 1st Sess. at 24-29 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717-723. In furtherance of this unification effort, Congress permitted the imposition of punitive damages under Title VII in the same general circumstances as punitive damage awards imposed by courts under § 1981. *Id.; and see* H.R. REP. No. 40(I), 102d Cong., 1st Sess. at 74 (1991),

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[13] The Supreme Court fashioned a similar standard for assessing punitive damages under § 1983. *Smith v. Wade*, 461 U.S. 30, 51, 103 S. Ct. 1625, 1637 (1983). In *Wade*, the Court held that punitive damages may be assessed under § 1983 when the defendant commits acts intentionally or with reckless or callous disregard for the plaintiff's rights. *Wade*, 461 U.S. at 51, 103 S. Ct. at 1637.

reprinted in 1991 U.S.C.C.A.N. 549, 612. Section 1981a provides that, for a district court to award punitive damages under Title VII, the complaining party must show "that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). "Punitive damages are available under [§ 1981a] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981. No higher standard may be imposed." 137 CONG. REC. H9527 (daily ed. Nov. 7, 1991) (Rep. Edwards' Interpretive Memorandum).

From our reading of the legislative history to the 1991 Amendments to Title VII, we can conclude that Congress intended these amendments to unify the law for employment discrimination cases. Accordingly, we shall consider the propriety of punitive damage awards under §§ 1981 and 1981a under the same criteria.

It is well settled that a private employer may be held liable for punitive damages in employment discrimination cases under § 1981 based on the acts of supervisory employees.[14] *Flanagan v. A.E. Henry Com. Health Serv. Ctr.*, 876 F.2d 1231, 1235 (5th Cir. 1989). Title VII, however, only provides for "employer" liability. 42 U.S.C. § 2000e-2. Although individuals may not be held liable under Title VII unless they meet § 2000e(b) definition of "employer," an individual employee's actions may subject the employer to liability under agency principles. *See Grant v. Lone Star Co.*, 21 F.3d 649, 652 (5th Cir.),

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[14] In *Flanagan*, we affirmed a district court's application of agency principles to extend liability under § 1981 to a private employer. *Id.* at 1236. We held that "in cases . . . where a clear agency relationship exists between the employer and supervisors with control over the operations of the employer and the employment status of the plaintiff, liability may be appropriately extended against the employer." *Id.*

cert. denied, 115 S. Ct. 574 (1994) (noting that "the purpose of the 'agent' provision in § 2000e(b) was to incorporate respondeat superior liability into Title VII."). The Supreme Court has also held that employers are not strictly liable under Title VII for the discriminatory acts of their agents. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72, 106 S. Ct. 2399, 2408 (1986). As such, agency principles apply under Title VII and should necessarily be extended to the remedies made available under the 1991 Amendments, 42 U.S.C. § 1981a.

For punitive damages to be assessed under § 1981 or § 1983, the defendant must have committed acts with malice or reckless indifference to the federally protected rights of the plaintiff. *Jones*, 761 F.2d at 1162; 42 U.S.C. § 1981a(b)(1). We review the propriety of the district court's punitive damage award for abuse of discretion. *Id.*

In the case *sub judice*, the district court found that Brown and Patterson were subjected to willful and malicious discrimination and awarded Brown and Patterson $150,000 each in punitive damages. Kennedy was the project manager and supervisor for PHP Healthcare's Fort Hood Facility. The record shows that Kennedy intentionally discriminated against Brown and Patterson. The record is replete with Kennedy's use of racial epithets and other actions demonstrating his reprehensible views on race relations. Evidence shows that Brown was scheduled to the less desirable night shifts and assigned menial tasks which white employees were not required to perform. The district court also found that PHP Healthcare and Kennedy discriminated against Brown on the basis of his race with respect to the assignment of benefits and disciplinary actions taken by the company.

The district court further found that Kennedy told Patterson "not another nigger is to be hired." A few days after Patterson hired another black employee, she was terminated. The court further found that Patterson's

attempt to contact PHP Healthcare's headquarters in an effort to stop the ongoing discrimination at the Fort Hood facility was another producing cause of her termination. After her termination, Kennedy created and back dated a document for use at Patterson's T.E.C. hearing detailing alleged misconduct. This report stated that, while Kennedy was at PHP Healthcare's headquarters in Washington, D.C., Patterson took a three hour lunch, she failed to report to work on another day, and she was absent from work when a patient escaped. Kennedy then lied about using this document to fire Patterson when he testified before the T.E.C. Based on the evidence presented, the district court found that Patterson was, in fact, fired soon after disobeying Kennedy's directive "not to hire any more niggers," while Brown was constructively discharged after he was assured that the racially hostile work environment at PHP Healthcare would change.

The district court found that these facts, taken together, showed Kennedy's malice and/or reckless indifference to the federally protected rights of Brown and Patterson and awarded punitive damages. *See* 42 U.S.C. § 1981a(b)(1). Under § 1981, the district court found Kennedy and PHP Healthcare jointly and severally liable to Brown for $150,000. Under Title VII, the district court found PHP Healthcare liable to Patterson for $150,000 as an "employer" under the terms of the statute.

Based on the record presented, we cannot say that the district court abused its discretion in assessing punitive damages against Kennedy. Kennedy's actions in falsifying documents to establish a paper trail of misconduct for Brown coupled with his racial animosity support a determination of malicious or reckless conduct justifying punitive damages.

However, the quantum of this award does not comply with the three factors set out by the Supreme Court to determine the reasonableness of a punitive damage award.

See BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1598-99 (1996). We understand that *BMW* deals with constitutional limits on punitive damages, but we find it instructive here. In *BMW*, the Court held that the following factors must be considered in determining whether a punitive damage award was reasonable: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm suffered and the damage award; (3) the difference between the damages awarded in this case and comparable cases. *Id.* An award of $150,000 fails to meet any of these three factors.

First, Brown was not personally subjected to verbal or physical abuse and no evidence suggests that Kennedy's actions reflected a prevailing attitude of PHP Healthcare to warrant such a large punitive assessment. In a close case such as this one, Kennedy's intentional falsification of documents is the only finding made by the district court which meets the malicious or reckless indifference requirement for imposing punitive damages. Next, the punitive damage assessment bears no "reasonable relationship" to the compensatory damage awards in this case. On remand, Brown's back-pay and lost benefits award will be substantially reduced from $22,648. Further, only nominal emotional damages are warranted in this case. Even if we based the punitive aware on the original back-pay and benefits award of $22,648 the ratio of punitives to compensatory damages would be approximately 6.5 to 1. The Supreme Court has recognized a punitive damage award of 4 times the amount of compensatory damages to be "close to the line" in terms of constitutional propriety. *BMW*, 116 S. Ct. at 1602 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S. Ct. 1032, 1046 (1991)). Finally, the largest punitive damage award under § 1981 in this circuit, of which we are aware to date, is $50,000. *See Jett v. Dallas Indep. Sch. Dist.*, 798 F.2d 748, 762 (5th Cir. 1986), *aff'd in part and remanded in part*, 109 S. Ct. 2702 (1989). For these reasons, we vacate the punitive damage award in favor

of Brown against Kennedy and remand for reassessment in light of this opinion.

As to the punitive damage assessments against PHP Healthcare under § 1981 and Title VII, we again recognize that "the trier of fact's decision whether to award [punitives] damages is discretionary." *Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994). However, we find no evidence in this record to support the district court's punitive damage assessment as to PHP Healthcare under either § 1981 or § 1981a.

The Supreme Court has held that § 1981 liability reaches only intentional discrimination, *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389-91, 102 S. Ct. 3141, 3149-50 (1982). The Court has also held that employers are not strictly liable for the acts of their employee. *Vinson*, 477 U.S. at 72, 106 S. Ct. at 2408. Agency principles apply to § 1981 (and to Title VII) to hold an employer liable "for those intentional wrongs of his employees that are committed in furtherance of the employment; the tortfeasing employee must think (however misguidedly) that he is doing the employer's business in committing the wrong." *General Bldg. Contractors*, 458 U.S. at 392, 102 S. Ct. at 3150-51. We agree that Kennedy's actions may be attributed to PHP Healthcare for purposes of compensatory damages, given his supervisory role as project manager.

However, the imposition of punitive damages under § 1981 and Title VII requires that the discrimination be malicious or done with reckless indifference. *Jones*, 761 F.2d at 1162; *and see* 42 U.S.C. § 1981a. All of the discriminatory acts in this case were solely acts of Kennedy. Kennedy was not a corporate officer of PHP Healthcare but was the "project manager" of the Fort Hood office. PHP Healthcare provided a handbook which expressly established a policy of non-discrimination and explained how employees could complain about discrimi-

natory practices to the company. Further, the vice president of human resources, John Bucur, testified that memos were distributed throughout the Fort Hood facility which also set out the procedures for making complaints to headquarters. No evidence suggests that Brown or Patterson followed these procedures in an attempt to notify PHP Healthcare's corporate office that Kennedy was discriminating against black employees. The record is completely void of evidence showing that PHP Healthcare took part in any discriminatory conduct much less any "malicious" or "reckless" conduct. The existence of the employment handbook setting forth a policy of non-discrimination is at least prima facie evidence of awareness on the part of PHP Healthcare of the federally protected rights of Brown and Patterson; and there is nothing in this record which purports to show that PHP Healthcare took any action which was inconsistent with that policy. Similarly, there is nothing in the record which would show that PHP Healthcare had knowledge of Kennedy's malicious or reckless conduct, or authorized, ratified, or approved Kennedy's actions. *See Fitzgerald*, 68 F.3d at 1263 (refusing to impose punitive damages under § 1981 where employer took no part in the intentional discrimination). Although Kennedy was the project manager of PHP Healthcare's Fort Hood facility, his actions alone, without some evidence showing that PHP Healthcare knew or should have known of Kennedy's malicious or reckless conduct, are insufficient to cause punitive liability to directly attach to PHP Healthcare.[15]

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[15] We have affirmed a district court's refusal to impose punitive damages based on evidence that a defendant had taken steps to eliminate racial discrimination and the ambiguous nature of the evidence at the district court level. *Jones v. Western Geophysical Co.*, 761 F.2d at 1162. When prompt remedial measures were taken by the employer, the evidence "did not compel the conclusion the [defendant] had behaved maliciously." *Id.* at 1162. Similarly, the evidence in this case does not compel the conclusion that PHP Healthcare behaved in a manner which warranted the imposition of punitive damages.

For these reasons, we hold that the district court abused its discretion in awarding punitive damages against PHP Healthcare in this case. Therefore, we vacate the district court's punitive damage award in favor of Brown and remand for reassessment against Kennedy under § 1981 in his individual capacity. We reverse Patterson's punitive damage award under Title VII because no individual liability attaches under this statute. *See Grant*, 21 F.3d at 651.

VIII.

PHP Healthcare and Kennedy further contend that the district court erred computing attorneys' fees in this case. When Brown and Patterson originally filed this suit on May 28, 1993, they were represented by the law firm of Salter and Thetford. Salter and Thetford withdrew as counsel on July 25, 1994. Brown retained David J. Guillory, David Weiser and Bill Bingham while Patterson hired W.V. Dunnam, Jr., as counsel. Brown then amended his complaint to add violations of 42 U.S.C. §§ 1981 and 1983. Patterson also filed an amended complaint adding intentional infliction of emotional distress. All claims except for Brown's § 1981 claim and Patterson's Title VII claim were dismissed at the summary judgment stage.

PHP Healthcare and Kennedy contend that the district court erred in awarding $22,500 in attorney's fees to Brown and Patterson for the time spent by the law firm of Salter & Thetford. Appellants also maintain that the $45,000 in attorney's fees awarded to Brown should have been reduced by the amount of hours spent on claims unrelated to the successful claims. We review a district court's award of attorney's fees for abuse of discretion. *Cooper v. Pentecost*, 77 F.3d 829, 831 (5th Cir. 1996).

Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Section 1988 authorizes district courts to award reasonable attorney's fees to prevailing parties in civil rights cases. *See Hensley*

v. Eckerhart, 461 U.S. 424, 429 (1983). In *Hensley*, the Supreme Court offered guidance for determining a proper award of attorney's fees in cases in which the plaintiffs brought a number of causes of action but prevailed on only a few or, in this case, one:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis.

Id. at 435.

Here, the district court properly followed the teachings of *Hensley* and reduced the attorney's fees award claimed by Guillory, Weiser and Bingham and further adjusted Salter and Thetford's stated hours. The district court also applied the *Johnson* factors.[16] *See Cooper*, 77 F.3d at 831 (recognizing that the district court must examine the factors set out in *Johnson*). Per *Johnson*, the district court examined the novelty and difficulty of the case, the requisite skill required to perform legal services, the preclusion of other employment, customary fees, amounts involved and results obtained; the desirability of the case, the nature and length of the professional relationship awards in similar cases, and the time and labor required. *Johnson*, 488 F.2d at 717-719.

Based on the district court's *Johnson* factor analysis and the findings presented, we find no abuse of discretion with respect to the district court's attorneys' fee award of $68,898.84 to Brown and $36,000 to Patterson.

IX.

In summary, we affirm the district court's judgment against PHP Healthcare for back pay on Patterson's claim

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[16] *Johnson v. Georgia Hwy Express*, 488 F.2d 714, 717-719 (5th Cir. 1974).

of retaliatory discharge under 42 U.S.C. § 2000e-3. We also affirm the district court's judgment of liability against PHP Healthcare and Kennedy for back pay on Brown's claim of race discrimination under 42 U.S.C. § 1981. However, because of his failure to exercise reasonable diligence to maintain substantially similar employment and mitigate his damages, we vacate the district court's back pay award as to Brown and remand that award to the district court for redetermination. The district court is instructed to reduce Brown's back pay award by excluding all back pay from the date of his involuntary termination from Metroplex forward.

We vacate the awards of emotional damages as to both Brown and Patterson and remand such awards to the district court with instructions to assess nominal damages for such claims. We also vacate the district court's award of punitive damage as to Brown and remand that award to the district court to reassess the award consistent with the instructions herein and to assess such award against Kennedy in his individual capacity. As to Patterson, we reverse the punitive damage award in its entirety and render judgment that no punitive damages are recoverable by Patterson against PHP Healthcare in this case. We affirm the awards of attorneys' fees in this case.

APPENDIX B

[Filed March 28, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil No. W-93-CA-236

DONNA PATTERSON, DR. MICHAEL L. ADAMS,
and NICHOLAS BROWN,
Plaintiffs,

v.

P.H.P. HEALTHCARE CORPORATION
and MARK KENNEDY,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the Court without a jury on the 8th and 9th days of March, 1995. In accordance with the testimony and evidence presented and upon consideration of argument of counsel, the following findings of fact and conclusions of law are hereby entered.

Findings of Fact

Defendants' Illegal Race Discrimination

1. During all times relevant to this lawsuit, P.H.P. Healthcare Corporation ("PHP") provided psychiatric services at the Darnell Army Community Hospital at Fort Hood, Texas to the U.S. Army under a contract dated July 1, 1991. Specifically, PHP performs psychiatric services under the contract for certain beneficiaries of Army personnel at Fort Hood.

2. During Plaintiff Brown's and Patterson's employment at PHP, Defendant Kennedy was also an employee of PHP. Mr. Kennedy was the project manager, a supervisory position.

3. Mr. Brown is a black male, who was employed by Defendants beginning on February 10, 1992. Ms. Patterson is a white female, who, during the relevant time period, was the head nurse at PHP.

4. Prior to and during Mr. Brown's employment at PHP, Defendant Kennedy repeatedly and routinely referred to black people as "porch monkeys" and "niggers." Defendant Kennedy also used these racial slurs with respect to Mr. Brown specifically.

5. Defendant Kennedy also stated with respect to black people, that "they think you owe them a living," and "they are all shiftless."

6. Defendant Kennedy uttered these and other racial slurs against black people while on PHP premises and during regular working hours. Defendant Kennedy further drew a caricature of Mr. Brown that included exaggerated racial features. This occurred during the taking of depositions in this case.

7. After Plaintiff Brown had already been hired, Defendant Kennedy told Donna Patterson to cease hiring black people.

8. Terminated black employees in the unit supervised by Defendant Kennedy were regularly and routinely replaced with white employees.

9. Plaintiff Brown was replaced by a white employee.

10. Defendant discriminated against Plaintiff Brown on the basis of race with respect to assignment of duties.

11. Defendants discriminated against Plaintiff Brown on the basis of race with respect to work schedules.

12. Defendants discriminated against Plaintiff Brown on the basis of race with respect to opportunity for promotion.

13. Defendants discriminated against Plaintiff Brown on the basis of race with respect to discipline.

14. Defendants discriminated against Plaintiff Brown on the basis of race with respect to allocation of benefits.

15. Defendants discriminated against Plaintiff Brown on the basis of race with respect to termination/retention.

16. That Donna Patterson on the last few days of July, 1992 called corporate headquarters of PHP and called to its attention the facts set out in the two preceding findings.

17. That in March, 1992, a few minutes after conclusion of a meeting airing complaints by black employees of racial discrimination, Mark Kennedy told Donna Patterson that "not another nigger is to be hired."

18. Thereafter in the first few days of August, 1992, Donna Patterson, by reason of a definite need of an employee in the position of tech, hired Eddie Harris, who was black.

19. That Donna Patterson's action in calling corporate headquarters in an effort to stop the discrimination against Nicholas Brown as to the benefits owed him was a producing cause of PHP's terminating her employment with it.

20. That the action of Donna Patterson in hiring a black, namely Eddie Harris, was a producing cause of PHP's terminating her employment by it.

21. Kennedy prepared a document setting forth his reasons for terminating Ms. Patterson. This document (Plaintiff Patterson's "Exhibit 2") was prepared after the fact and back-dated by Kennedy and Dr. Chaparala, the medical director.

22. Kennedy lied about the document being used to terminate Ms. Patterson when he testified before the Texas Employment Commisison.

23. Plaintiff Patterson was terminated because she hired a qualified black technician, Eddie Harris, in contravention of the illegal directive given her by Kennedy.

Plaintiff Brown's Constructive Discharge

24. Plaintiff Brown's resignation was withdrawn by him in a timely manner, after he was led to believe by an official at Defendant's Corporate Headquarters that the hostile work environment might be improved.

25. Defendants' refusal to allow Plaintiff Brown to withdraw his resignation constituted constructive discharge, termination, and retaliation for Mr. Brown having complained of racial problems.

26. The Defendant's stated non-discriminatory reasons for its treatment of Brown are either untrue or are pretexts for racial discrimination.

Plaintiff Brown's Damages

27. Plaintiff Brown suffered mental anguish and emotional distress caused by the racially discriminatory actions of Defendants.

28. Plaintiff Brown diligently sought other employment subsequent to his employment at PHP.

29. Plaintiff Brown has mitigated his damages.

30. Plaintiff Brown worked a second job part-time while he was employed by Defendants.

31. Plaintiff Brown suffered loss of income and lost benefits in the amount of $22,648.00, as a result of Defendants' wrongful acts.

32. Plaintiff Brown has suffered emotional damage, and mental pain and suffering. The amount of such damages recoverable by Plaintiff Brown is $40,000.00.

33. Plaintiff Brown was subjected to willful and malicious discrimination, entitling him to punitive damages in an amount sufficient to deter the Defendant from future acts of this type. That amount is $150,000.00.

34. Plaintiff Brown was successful in this suit entitling him to an award of attorneys' fees.

Plaintiff Patterson's Damages

35. Plaintiff Patterson suffered mental anguish and emotional distress caused by the racially discriminatory actions of Defendants.

36. Plaintiff Patterson diligently sought other employment subsequent to her employment at PHP.

37. Plaintiff Patterson has mitigated her damages.

38. Plaintiff Patterson suffered loss of income and lost benefits in the amount of $40,000.00, as a result of Defendants' wrongful acts.

39. Plaintiff Patterson has suffered emotional damage, and mental pain and suffering. The amount of such damages recoverable by Plaintiff Patterson is $150,000.00.

40. Plaintiff Patterson was subjected to willful and malicious discrimination, entitling her to punitive damages in an amount sufficient to deter the Defendant from future acts of this type. That amount is $150,000.00.

41. Plaintiff Patterson was successful in this suit entitling her to an award of attorneys' fees.

Defendants' After-Acquired Evidence Argument as to Plaintiff Brown

42. Plaintiff Brown truthfully completed his application for employment at PHP.

43. Defendants were aware that Plaintiff Brown had never been adjudicated or convicted of criminal wrongdoing.

44. Defendants would not have immediately terminated the employment of Plaintiff Brown or any other employee who had never been adjudicated or convicted of criminal wrongdoing.

Defendant Mark Kennedy

45. There was no evidence that Mark Kennedy was a covered employee under Title VII.

46. Any finding of fact which should more appropriately be a conclusion of law is deemed so.

Conclusions of Law

1. Defendants have not articulated a credible legitimate non-discriminatory reason for their hostile and racially-based actions toward either Plaintiff Brown or Plaintiff Patterson.

2. Defendants committed acts of racial discrimination in the terms and conditions of Plaintiff Brown's employment, in violation of 42 U.S.C. §§ 1981, and 1981(b), with respect to (a) assignment of duties, (b) work schedules, (c) opportunity for promotion, (d) discipline, (e) allocation of benefits, and (f) termination/retention.

3. Plaintiff Brown was constructively discharged by being subjected to a racially hostile work environment.

4. Independent of the racially hostile work environment, Defendants' refusal to allow Plaintiff Brown to withdraw his resignation constituted constructive discharge, termination, and retaliation.

5. Defendants' "after-acquired evidence" argument fails because the PHP employee who hired him was aware of his background.

6. Defendants failed to carry their burden of proving that Defendants would have fired Plaintiff Brown immediately if they had discovered that he had never been adjudicated or convicted of criminal wrongdoing or because

his application for employment was not completely accurate.

7. Plaintiff Brown is entitled to damages for back-pay, reinstatement or front pay, lost benefits, mental anguish, and emotional distress, in the amount of $22,648.00.

8. Plaintiff Brown has suffered emotional damage, and mental pain and suffering. The amount of such damages recoverable by Plaintiff Brown is $40,000.00.

9. Defendants' racially discriminatory treatment of Plaintiff Brown rose to a level of intent that authorizes the Court to award punitive damages in the amount of $150,000.00.

10. Plaintiff Brown is entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

11. Defendant would not have terminated Plaintiff Patterson, "but for" her having employed a black technician after being instructed not to do so.

12. Plaintiff Patterson is entitled to damages for back-pay, reinstatement or front pay, lost benefits, mental anguish, and emotional distress, in the amount of $40,000.00.

13. Plaintiff has suffered emotional damage, and mental pain and suffering. The amount of such damages recoverable by Plaintiff Patterson is $150,000.00.

14. Defendants' racially discriminatory treatment of Plaintiff Patterson rose to a level of intent that authorizes the Court to award punitive damages in the amount of $150,000.00.

15. Plaintiff Patterson is entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

16. The evidence of racial animus on the part of Kennedy and PHP shifted the burden to PHP of proving the adverse employment actions taken against these Plaintiffs would have been taken regardless of the racial dis-

crimination. PHP has not met its burden by a preponderance of the evidence.

17. Mark Kennedy is not a covered employee under Title VII and is not liable to either Plaintiff.

18. Any conclusion of law which should more appropriately be a finding of fact is deemed so.

SIGNED this 28th day of March, 1995.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50319

DONNA PATTERSON; NICHOLAS BROWN,
Plaintiffs-Appellees

and

MICHAEL L. ADAMS,

v. *Plaintiff*

P.H.P. HEALTHCARE CORPORATION; MARK KENNEDY,
Defendants-Appellants

Appeals from the United States District Court
for the Western District of Texas, Waco

ON PETITION FOR REHEARING
(September 11, 1996)

Before DUHÉ, BARKSDALE, and DEMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT

/s/ Harold R. DeMoss, Jr.
United States Circuit Judge

APPENDIX D

[Filed Apr. 27, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil No. W-93-CA-236

DONNA PATTERSON, DR. MICHAEL L. ADAMS,
and NICHOLAS BROWN,
Plaintiffs,

v.

P.H.P. HEALTHCARE CORPORATION and MARK KENNEDY,
Defendants.

SECOND AMENDED JUDGMENT

On the 8th and 9th days of March, 1995, this case came on for trial before the Court without a jury. In accordance with the Findings of Fact and Conclusions of Law, as well as the Court's Order of March 28, 1995, partially granting the Defendants' Motion for Summary Judgment, the Court enters its judgment as follows:

IT IS ORDERED, ADJUDGED, and DECREED that Plaintiff, Dr. Michael L. Adams have and recover nothing from defendants, P.H.P. Healthcare Corporation and Mark Kennedy.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Donna Patterson have and recover the following from Defendant P.H.P. Healthcare Corporation:

Loss of income and lost benefits in the amount of $40,000.00;

Emotional damage, and mental pain and suffering in the amount of $150,000.00; and

Punitive damages in the amount of $150,000.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Nicholas Brown have and recover the following from defendants P.H.P. Healthcare Corporation and Mark Kennedy, jointly and severally:

Back-pay and lost benefits in the amount of $22,648.00;

Emotional damage, and mental pain and suffering in the amount of $40,000.00; and

Punitive damages in the amount of $150,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Nicholas Brown be, within thirty (30) days, reinstated to his former position with defendant P.H.P. Healthcare Corporation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any relief not expressly granted in this judgment is DENIED.

SIGNED this 27th day of April, 1995.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
United States District Judge

(2)

Supreme Court, U.S.
FILED
DEC 9 1996
CLERK

No. 96-734

In The

Supreme Court of the United States

October Term, 1996

DONNA PATTERSON and NICHOLAS BROWN,

Petitioners,

v.

P.H.P. HEALTHCARE CORPORATION and MARK KENNEDY,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court will grant certiorari to consider Petitioners' contention that the court below imposed a "heightened evidentiary requirement" to support a damages award for emotional injury, when the opinion below imposed no such requirement but, rather, analyzed the facts of this case in accordance with the rules of decisions of this Court and of other circuits.

2. Whether this Court will grant certiorari to consider Petitioners' contention that, under 42 U.S.C. §§ 1981, 1981a, punitive damages must be assessed against an employer in all cases, without exception, whenever an individual project manager acts with malice towards the plaintiff employee, when the Fifth Circuit, in accordance with decisions of this Court and other circuits, considered the corporate employer's lack of knowledge or notice and the care taken by the corporate employer to protect its employees from discrimination in holding that punitive damages should not be imposed against the corporate employer under the facts of this case.

PARTIES TO THE PROCEEDINGS

Respondents, P.H.P. Healthcare Corporation and Mark Kennedy, are the Defendants.

Petitioners, Donna Patterson and Nicholas Brown, are the Plaintiffs.

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RESPONDENTS' BRIEF IN OPPOSITION

TO THE UNITED STATES SUPREME COURT:

Respondents, P.H.P. Healthcare Corporation and Mark Kennedy, respectfully request that this Court deny the petition for writ of certiorari.

OPINIONS BELOW

The opinion of the Court of Appeals [Resp. App. A] is reported at 90 F.3d 927. Its order denying rehearing [Resp. App. C] is not reported. The findings of fact and conclusions of law of the district court [Resp. App. B] are not reported.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

PROVISIONS OF LAW INVOLVED

42 U.S.C. § 1981 and 42 U.S.C. § 1981a.

STATEMENT OF THE CASE

A. Factual Background

P.H.P. Healthcare Corporation ("PHP") provided psychiatric services to the United States Army at Darnall Army Community Hospital in Fort Hood, Texas, pursuant to a federal contract. [R. 1060]. PHP hired Mark

Kennedy as project manager, and Petitioner Donna Patterson ("Patterson," a white female) as head nurse. Petitioner Nicholas Brown ("Brown," a black male) was hired as a mental health technician. [R. 1282].

During the period of Petitioners' employment, PHP, as a government contractor, maintained an Affirmative Action Plan which monitored minority hiring, training and promotions. [Tr. 509]. The evidence was undisputed that PHP, at all times, met its federally mandated Affirmative Action Plan requirements for hiring minority employees in Brown's position. [Tr. 510-13; D-Exs. 2, 3].

Brown's employment at PHP was marked by excessive absences, tardiness, and other inappropriate behavior, and he received numerous disciplinary warnings from his supervisors (some of whom were black), as well as from Patterson. According to Patterson's written warning to him, Brown's transgressions included a pattern of calling in sick before and after scheduled days off and failing to work shifts as agreed. [D-Ex. 56].

On July 30, 1992, Brown applied for a full-time position at another hospital, Metroplex, and, on September 1, 1992, he was hired by Metroplex for a position comparable to (and with higher wages than) his job at PHP. [Tr. 428, 488, 500]. Three days later, he submitted his resignation letter to PHP. [D-Ex. 76]. In April 1993, he was fired by Metroplex for excessive absenteeism, spending excessive time on personal phone calls, and conflicts with the nursing staff. [Tr. 501].

The district court found that Kennedy used racial slurs against blacks. Brown's own testimony, however, established that such slurs were not directed toward him

or made in his presence. [Tr. 414, 484-85]. In fact, Brown was unaware of the use of such language until two weeks before he resigned, and even then, Brown had only secondhand knowledge that on one occasion Kennedy had allegedly used a racial slur. [Tr. 415]. Neither Brown nor Patterson ever reported to PHP executives that Kennedy had used such language. [Tr. 190-91]. The evidence was undisputed that PHP does not condone such conduct, does not tolerate discrimination and maintains a strict policy against any type of harassment or discrimination. [D-Ex. 11]. Notice was given to all employees that complaints of harassment or discrimination could be brought to the attention of the EEO officer. [Tr. 517]. Brown did not register a complaint with PHP nor did he file an EEOC complaint at any time during or after his employment. [R. 1145].

Patterson's employment also was marked by absences, tardiness, and other inappropriate behavior. [Tr. 179-181, 242, 338-39, 514]. She had been given several verbal warnings in the months preceding her termination. [Tr. 242, 339, 514]. Then, shortly before her termination, Patterson – the head nurse – took a three-hour lunch, asked an employee to lie for her, reported to work late on one occasion, and completely failed to report for her scheduled shift on another (on which occasion a patient escaped). [Tr. 177-78, 181, 344-47]. Kennedy brought these and other problems concerning Patterson to the attention of Dilip Chaparrala, the medical director, and John Bucur, the personnel director. Bucur authorized Patterson's termination based on her misconduct. [Tr. 515-16]. Petitioners say that Patterson then had to endure a "full year's unemployment" (Pet. 5), but, in fact, she promptly

found employment with another hospital. After one month, however, her new employer gave her the option of resigning or being terminated because of excessive absences. [Tr. 502].

The district court found that Patterson was terminated from PHP in retaliation for opposing discrimination by Kennedy. Patterson, however, did not express any complaints about racial discrimination or the use of racial slurs by Kennedy to PHP corporate personnel either before or after her termination. [Tr. 138, 140, 183-87; D-Exs. 94, 102, 110].[1] It is undisputed that Bucur was unaware of any alleged racial discrimination or harassment. [Tr. 515-16].

B. District Court Proceedings

This case began as a state court action by Petitioners alleging that the principal motivation for their alleged terminations was retaliation for reports made by them concerning PHP's alleged violation of PHP's government contract. [R. 9-12]. They further alleged violations of their civil rights. [R. 13-15]. PHP removed the case to federal

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[1] Petitioners point to testimony from Patterson that in July 1991, Kennedy warned black employees that he would not tolerate EEOC complaints, and that in March 1992, Kennedy allegedly ordered her not to hire any more blacks. [Pet. 2-3]. Patterson, however, filed no complaint at that time and did not report the alleged incidents to anyone. [Tr. 188-89]. In fact, in March 1992, Patterson wrote PHP praising Kennedy for his management of the program, stating: " . . . I can say with all honesty that I have never worked with anyone as dedicated to his work and the people whom he represents as Mark." [D-Ex. 94].

court, where both Petitioners filed amended complaints. Patterson alleged PHP terminated her employment for reports she made about alleged contract violations and further contended that her termination violated 42 U.S.C. § 2000e-3 in that it was in retaliation for opposing racially discriminatory practices. Brown's amended complaint alleged causes of action under 42 U.S.C. §§ 1981 and 1983, the Texas and U.S. Constitutions, and for retaliation for exercising his free speech rights related to the alleged contractual abuses. The district court, Honorable Walter S. Smith, granted Respondents' motion for summary judgment as to all claims except two – Brown's claim under 42 U.S.C. § 1981 and Patterson's claim under 42 U.S.C. § 2000e-3. After a two-day bench trial, the district court ruled for Petitioners on those claims. The judgment (after two amendments) was that Patterson recover $340,000.00 ($40,000 in back pay; $150,000 for mental anguish; $150,000 for punitive damages) against PHP and that Brown recover $212,634.00 ($22,648 in back pay; $40,000 for mental anguish; $150,000 for punitive damages) against Kennedy and PHP, plus attorneys' fees subsequently awarded in the amounts of $36,000 to Patterson and $68,898.84 to Brown.[2] [Resp. App. D].

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[2] The judgment was amended twice. The first amended judgment imposed liability in favor of Brown and Patterson against Kennedy jointly and severally with PHP. [R. 1371]. The second amended judgment vacated Patterson's judgment against Kennedy, but did not otherwise change the first amended judgment. [R. 1405].

C. Court of Appeals Proceedings

The Fifth Circuit affirmed liability as to Brown's race discrimination claim, Patterson's retaliation claim, and both Petitioners' attorneys' fee awards. The court held that Brown (whose own conduct caused his termination from subsequent employment) failed to mitigate his damages, and, thus, vacated his back pay award and remanded it for redetermination. Holding that neither Petitioner had presented "testimony and/or other evidence to show the nature and extent of emotional harm . . . ," the Fifth Circuit vacated the mental anguish awards as to both Petitioners with instructions for the district court to assess nominal damages. The court held Brown was entitled to punitive damages against Kennedy but, because the award did not comply with the factors set out by this Court in *BMW of N. Am., Inc. v. Gore*, ___ U.S. ___, 116 S. Ct. 1589 (1996), remanded with instructions for the district court to reassess the award.[3] Holding that there was no evidence in the record to support the district court's awards of punitive damages against PHP, the court reversed those awards and rendered judgment that PHP had no liability for punitive damages.

REASONS FOR DENYING THE PETITION

A. THE DECISION BELOW IS IN ACCORDANCE WITH SUPREME COURT AUTHORITY AND DOES NOT IMPOSE A "HEIGHTENED EVIDENTIARY REQUIREMENT."

The thrust of Petitioners' first point is that the Fifth Circuit insists on a "heightened evidentiary requirement"

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[3] Since Patterson sued under Title VII, Kennedy was not individually liable to her for either actual or punitive damages.

to support an award for mental anguish damages. The Fifth Circuit imposed no such requirement – the words "heightened evidentiary requirement" are nowhere in the court's opinion. Rather, the court clearly stated that it applied the usual rules applicable to a review of a district court's findings of fact – i.e., that the appellate court will reverse such findings "only when, after weighing the evidence, we are definitely and firmly convinced that the district court made a mistake." [Resp. App. 9a].

Notwithstanding the Fifth Circuit's clear expression of its standard of review, Petitioners seek to construct a "heightened evidentiary requirement" by attributing to the Fifth Circuit the "view" that the victim's testimony "alone is not 'competent evidence' to support a [mental anguish damages] award." [Pet. 7]. Again, Petitioners find in the Fifth Circuit opinion a statement of the law which is not there, and, in fact, is refuted by the plain language of the opinion as follows:

> The Supreme Court has . . . required that compensatory damages such as emotional harm caused by the deprivation of constitutional rights may be awarded only when claimants submit proof of actual injury. *Carey v. Piphus*, 435 U. S. 247, 255-56, 98 S. Ct. 1042, 1048 (1978). Therefore, a claimant must present testimony and/*or* other evidence to show the nature and extent of emotional harm caused by the alleged violation.

[Resp. App.18a, emphasis added]. Thus, far from holding, as Petitioners contend, that a victim's testimony, by itself, may never support a mental anguish award, the Fifth

Circuit recognized and said that *testimony alone* – "testimony and/*or* other evidence" – indeed *can* be sufficient if that testimony shows "actual injury" and "the nature and extent of emotional harm caused by the alleged violation."[4] *Id.*

A claimant, of course, cannot recover damages unless the claimant presents competent evidence of actual injury. *Farrar v. Hobby*, 506 U.S. 103, 113 S. Ct. 566, 573 (1992). This is because the purpose of an award of damages is to compensate persons for injuries sustained as a result of the violation of their legal rights. *Carey v. Piphus*, 435 U.S. 247, 254-57, 98 S. Ct. 1042, 1047-49 (1978). *Carey* instructs that "substantial damages should be awarded only to compensate actual injury. . . . " *id.* at 266, 98 S. Ct. at 1054, and further, that while compensatory damages for mental anguish are recoverable for constitutional violations, such damages may not be presumed. Moreover, a claimant's failure to prove compensatory damages with competent

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[4] Petitioners say that "There is no dispute that petitioners presented preponderant evidence that they suffered actual injury as a result of their unlawful treatment." [Pet. 8]. If this statement means that there is no dispute that Petitioners sustained some *economic* loss, the statement is correct – Petitioners received damage awards for such losses and do not here complain of them. However, if (as the context of their statement would appear to indicate) Petitioners are saying that there is "no dispute" that Petitioners presented "preponderant evidence" of actual *emotional* injuries, the statement is egregiously wrong. Respondents vigorously contested the competency and sufficiency of Petitioners' evidence of emotional injury, and, of course, the Fifth Circuit squarely held that Petitioners' evidence on that subject was insufficient.

evidence allows recovery of only nominal damages, typically one dollar. *Id.* at 266-67, 98 S. Ct. at 1053-54. In *Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 106 S. Ct. 2537 (1986), this Court reaffirmed the teachings of *Carey* that to recover compensatory damages, a claimant must suffer actual, demonstrable injury. *Id.* at 307, 106 S. Ct. at 2543.

This Court has further recognized that emotional distress damages are fraught with vagueness and speculation, and are easily susceptible to fictitious and trivial claims. *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 114 S. Ct. 2396, 2408 (1994). Acknowledging the nebulous nature of such damages, federal courts carefully review mental anguish awards which are based solely on the claimant's testimony. *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1246 (4th Cir. 1996). Thus, the courts require such damages to be proved by a "sufficient quantum of proof demonstrating the violation caused compensable injury." *Price*, 93 F.3d at 1246; *Perez v. Rodriguez Bou*, 575 F.2d 21, 25 (1st Cir. 1978) (stating courts are "not inclined to award compensatory damages for general mental [anguish] . . . or unexplained negative effects of" constitutional violations); *Rodgers v. Fisher Body Div., Gen Motors Corp.*, 739 F.2d 1102, 1108 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054, 105 S. Ct. 1759 (1985) (holding plaintiff's testimony did not demonstrate his mental distress with the specificity required by *Carey*); *Biggs v. Village of Dupo*, 892 F.2d 1298, 1304-05 (7th Cir. 1990) (requiring plaintiff to show "demonstrable emotional distress"); *Johnson v. Hale*, 940 F.2d 1192, 1193 (9th Cir. 1991) (noting plaintiffs provided "detailed and substantial" testimony to support their mental distress claim); *Morgan v.*

Secretary of Housing and Urban Dev., 985 F.2d 1451, 1459 (10th Cir. 1993) (requiring more than "mere assertions of emotional distress").

Petitioners contend that in the instant case "preponderant evidence was not good enough for the court below" – that "because there was no corroborating evidence of petitioners' emotional injuries, their testimony was not even deemed competent." [Pet. 9]. As the opinion makes clear, however, the reason Petitioners' testimony was deemed incompetent was that it was so vague and conclusory that it was not sufficient to establish the demonstrable emotional distress which the cases require, and, furthermore, the other evidence in the record not only did not corroborate, it refuted, Petitioners' claims that their alleged distress was caused by Respondents' purported discrmination.

Brown only presented subjective testimony, such as that he felt "real bad," "frustrated," "angry," and "uneasy," and that the "unbearable" working environment was "tearing my self-esteem down." As stated by the Fifth Circuit (Resp. App. 22a), he did not claim any specific discernable injury such as sleeplessness or depression. He did state that he had marital problems, which he attributed to having "no income" [Tr. 414-23], but it was undisputed, however, that three days after his resignation from PHP he went to work at another hospital at higher wages. Patterson testified that she was "bothered," had "worry," "concern," and "anxiety," but the problems, if any, that were caused by her discharge were never differentiated in her testimony from the stress she already was suffering from poor health (possible

lupus), a child custody dispute, and flashbacks from having witnessed a massacre at a local cafeteria. [Tr. 97, 100-01, 198-201, 360-64]. The Petition asserts [Pet. 15 n.4] that Patterson was troubled with "sleeplessness," but the testimony to which Petitioners apparently refer is her answer of "yes, sir," to the question whether she was bothered, "not only in the – in the day, but also sometimes at night when you were trying to sleep," by loss of income. [Tr. 97]. Patterson has recovered damages for loss of income. Finally, Patterson insisted at the trial that her new job was stressful because she was "working with some of those physic – psychiatric criminals." [Tr. 96]. However, she worked with psychotics at both her new job and her job with PHP – she was a psychiatric nurse.

The Fifth Circuit's recent decision in *Farpella-Crosby v. Horizon Health Care*, 97 F.3d 803 (5th Cir. 1996), clearly shows that the Fifth Circuit does not impose a "heightened evidentiary requirement" and will, in a proper case, affirm an award for mental anguish damages based on the plaintiff's testimony. The court there held that the evidence in that case, which, the court noted, went well beyond Patterson's and Brown's, was sufficient to show a "specific discernable injury to the claimant's emotional state" in the form of humiliation and stress. *Id.* at 808-09. The court did not require corroboration, expert medical testimony, or testimony regarding physical manifestations of harm, although some corroborating evidence was presented. Thus, the Fifth Circuit itself does not view the opinion in the instant case as creating a "heightened evidentiary requirement" requiring in all cases corroboration, proof of physical manifestations, or medical

evidence. Petitioners have no basis for urging this Court to grant certiorari to decide whether the Fifth Circuit required Petitioners to prove an actual injury by a "heightened evidentiary requirement."[5]

B. THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THE OTHER CIRCUITS.

Petitioners argue that the Fifth Circuit has strayed from the other circuits by requiring corroborating evidence to support anything more than a nominal damage award. On the contrary, the holding below is consistent with the other federal circuits, which also carefully review damages awards based solely on a claimant's testimony, and hold that while a claimant's testimony alone may support an award of more than nominal damages for mental anguish, such testimony must be adequately developed and sufficiently articulated.

In *Spence v. Board of Educ. of Christina Sch. Dist.*, 806 F.2d 1198 (3rd Cir. 1986), which is cited by Petitioners, the Third Circuit significantly reduced a damage award because it was based on the conclusory testimony of the claimant that she was "depressed" and "humiliated." *Id.* at 1201. In reaching its decision, the court stated that the plaintiff offered no proof of physical or psychological

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[5] Petitioners filed no petition for rehearing en banc in the Fifth Circuit. Patterson filed a petition for panel rehearing; Brown filed no petition for rehearing at all.

injury and that the testimony did not establish "a reasonable probability, rather than a mere possibility, that damages due to emotional distress were in fact incurred. . . ." *Id.* Likewise, in *Gunby v. Pennsylvania Elec. Co.*, 840 F.2d 1108, 1120-22 (3rd Cir. 1988), *cert. denied*, 492 U.S. 905, 109 S. Ct. 3213 (1989), the Third Circuit reversed a mental anguish award where the only evidence supporting the award was the plaintiff's conclusory testimony that he was "very upset," "had been done wrong" and had been "treated unfairly."

Petitioners cite the Third Circuit's decision in *Bolden v. Southeastern Pa. Transit Auth.*, 21 F.3d 29 (3rd Cir. 1994), as rejecting the "heightened evidentiary requirement" allegedly adopted by the court below. In affirming the damages award, the *Bolden* court emphasized that the plaintiff, in contrast to *Gunby, supra*, presented corroborating evidence from four witnesses as to his emotional state. *Bolden*, 21 F.3d at 33. The court rejected the defendant's argument that damages were not recoverable *as a matter of law* in the absence of expert medical testimony, but that holding does not contradict the holding here which does not require expert medical testimony.

Similarly, the Fourth Circuit has determined that conclusory testimony by the claimant is not sufficient to support an award of damages for mental anguish. *Price v. City of Charlotte, N.C.*, 93 F.3d 1241, 1246 (4th Cir. 1996). The Fourth Circuit's decision in *Price* is quoted by Petitioners as follows:

> [W]e conclude that a plaintiff's testimony, standing alone, can support an award of compensatory damages for emotional distress based on a constitutional violation. . . .

[Pet. 11]. Petitioners, however, failed to set forth the language immediately following their quotation, which is:

> **however, the testimony must establish that the plaintiff suffered demonstrable emotional distress, which must be sufficiently articulated; neither conclusory statements that the plaintiff suffered emotional distress nor the mere fact that a constitutional violation occurred supports an award of compensatory damages.**

93 F.3d at 1254 (emphasis added). Explaining that the case law required the court to "scrupulously analyze an award of compensatory damages for a claim of emotional distress predicated exclusively on the plaintiff's testimony," *id.* at 1251, *Price* held that the evidence presented by the claimant was insufficient to support a compensatory damage award. The Fourth Circuit expressed "the same trepidation as our sister circuits regarding conclusory testimony" of mental anguish damages by the plaintiffs, "which did not indicate how their alleged distress manifested itself." *Id.* at 1254-55. Rejected as insufficient was testimony that the plaintiffs felt "humiliated," "betrayed," embarrassed," "devastated," and "deceived" by the discriminatory practices of the employer. *Id.* at 1255. Similarly, testimony that a plaintiff's "self-esteem went from rather high" was also deemed insufficient. *Id.*

Finding that the only evidence of mental stress was the plaintiff's own brief testimony that he was humiliated by having to go on welfare, the Sixth Circuit in *Rodgers v. Fisher Body Div., Gen. Motors Corp.*, 739 F.2d 1102, 1108 (6th Cir. 1984), *cert. denied*, 470 U.S. 1054, 105 S. Ct. 1759 (1985), held the plaintiff's evidence was "too slight" to

sustain a high damages award. Similarly, in *Erebia v. Chrysler Plastic Prods. Corp.*, 772 F.2d 1250, 1259 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015, 106 S. Ct. 1197 (1986), the Sixth Circuit rejected as insufficient the plaintiff's proof that he was "highly upset" about being subjected to racial slurs. Noting that such testimony did not satisfy the specificity requirements of *Carey*, the court remanded to the district court with instructions to award nominal damages. *Id.*

The Seventh Circuit in *Biggs v. Village of Dupo*, 892 F.2d 1298 (7th Cir. 1990), held that "when the injured party provides the sole evidence [of mental distress], he must reasonably and sufficiently explain the circumstances of his injury and not resort to mere conclusory statements." *Biggs*, 892 F.2d at 1304. In *Biggs*, the claimant's testimony that he was "affected emotionally by being fired" and was "concerned over the idea of his family having to deal with his discharge" was rejected as insufficient. *Id.* Similarly, in *Nekolny v. Painter*, 653 F.2d 1164 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021, 102 S. Ct. 1719 (1982), the claimants' statements that they were "very depressed," "despondent" and "humiliated" was not enough to establish injury. *Nekolny*, 653 F.2d at 1172-73. In the Seventh Circuit case of *United States v. Balistrieri*, 981 F.2d 916, 931 (7th Cir. 1992), *cert. denied*, 510 U.S. 812, 114 S. Ct. 58 (1993), a housing discrimination case cited by Petitioners (in which the award of emotional distress damages was $2,000 per plaintiff), the court applied the same rule that was articulated in *Biggs* and *Nekolny*, but, it concluded that the plaintiff's testimony regarding emotional distress was more detailed than that

which was found lacking in *Biggs* and *Nekolny*. Thus, that case does not assist Petitioners.

The Ninth Circuit requires more than conclusory evidence to support an award of damages for mental anguish. For example, in *Johnson v. Hale*, 940 F.2d 1192 (9th Cir. 1991), the Ninth Circuit emphasized that the plaintiffs provided "detailed and substantial" testimony to support their claim of actual emotional injury. *Id.* at 1193. In that case, the court noted that the plaintiffs also presented corroborating testimony. *Id.* at 1193-94. According to the Tenth Circuit, "[m]ore than mere assertions of emotional distress are required." *Morgan v. Secretary of Housing and Urban Dev.*, 985 F.2d 1451, 1459 (10th Cir. 1993).

Petitioners cite *Koopman v. Water Dist. No. 1 of Johnson County, Kan.*, 41 F.3d 1417 (10th Cir. 1994), *cert. denied*, ___ U.S. ___, 116 S. Ct. 420 (1995), and *Williams v. Trans World Airlines, Inc.*, 660 F.2d 1267 (8th Cir. 1981), to show that a split in the circuits exists. *Koopman*, however, turned on the fact that the plaintiff had not established whether the plaintiff's alleged mental anguish was caused by a wrongful termination or by a denial of due process. *Id.* at 1420. In the absence of proof of causation, the court held that the district court was not required to instruct the jury on emotional distress damages caused by the denial of due process. *Id.* As for *Williams*, it simply points out that a claimant's testimony may be sufficient to establish mental anguish damages. *Id.* at 1273. This in no way conflicts with the decision below.

Citing cases from the Second, Sixth, Ninth, Eleventh and D.C. circuits, Petitioners argue the remaining circuits

implicitly reject an evidentiary standard that requires corroboration. [Pet. 12-13]. Those cases, however, show that the evidence of emotional distress from the claimant was far greater than that submitted by Petitioners here and, indeed, included testimony regarding the manifestations of the emotional harm. *Meyers v. City of Cincinnati*, 14 F.3d 1115, 1119 (6th Cir. 1994) (claimant's psychological injuries had "physical effects" including weight loss and stomach problems for which he was prescribed medicine)[6]; *DeNieva v. Reyes*, 966 F.2d 480, 487 (9th Cir. 1992) (claimant's testimony indicated she suffered from dizziness and vomiting); *Secretary, HUD on behalf of Herron v. Blackwell*, 908 F.2d 864, 873 (11th Cir. 1990) (claimant testified about loss of sleep and headaches); *Carter v. Duncan-Huggins, Ltd.*, 727 F.2d 1225, 1238 (D.C. Cir. 1984) (affirming an award of $3,000 for emotional injury as not unreasonable on the basis that the record supported the conclusion that the plaintiff suffered actual injury); *Ragin v. Henry Macklowe Real Estate Co.*, 63 F.3d 898 (2nd Cir. 1993) (affirming an award of $2,500 per plaintiff but holding the testimony insufficient to support a greater award because the plaintiffs did not show any manifestations of harm).

Far from establishing a new and "aberrant" [Pet. 6] evidentiary requirement, the Fifth Circuit's opinion in this case is consistent with the other circuits. The cases

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[6] As shown at pages 14-15 hereof, the Sixth Circuit is committed to the rule, applied by the Fifth Circuit in the instant case, that an award of more than nominal damages will not be upheld when the plaintiff "has not demontrated his mental distress with the specificity required by *Carey v. Piphus.*" *Erebia*, 772 F.2d at 1259.

discussed above show that a claimant's testimony alone may be sufficient to support mental anguish damages when it is adequately developed, genuine, and sufficiently explained. There is no conflict among the circuits.

C. THE DECISION BELOW IS CONSISTENT WITH THE EEOC'S INTERPRETATION OF THE CIVIL RIGHTS ACT OF 1991.

Petitioners also contend the Fifth Circuit's holding is inconsistent with the EEOC's interpretation of the Civil Rights Act of 1991. They say the court below relied on the EEOC's policy guidance and decisions to conclude that a "victim's testimony alone is insufficient to support an award for emotional distress." [Pet. 14]. As discussed at page 7 hereof, the Fifth Circuit did not hold a victim's testimony could never be sufficient; it said that testimony alone – "testimony and/or other evidence" – can be sufficient, but that it was not sufficient in this case.

Petitioners also say the court below used the EEOC policy statement as a basis to require proof of "physical manifestations of emotional harm as a prerequisite for recovery." [Pet. 15]. The opinion below recognized, as did the *Farpella-Crosby* case, that the EEOC considers that emotional harm may manifest itself in both "physical manifestations" as well as "intangible injury". [Resp. App. 24a]. In any event, the EEOC policy guide and the court below are in agreement that "the existence, nature and severity of emotional harm must be proved." POLICY GUIDE ON COMPENSATORY DAMAGES UNDER 1991 CIVIL RIGHTS ACT, 8 FAIR EMP. PRAC. MANUAL § 405:7096 (BNA 1992). The policy itself discusses the different "manifestations" of

harm and lists numerous ways emotional harm may manifest itself, including physical manifestations. As shown above, Petitioners did not testify to any of the manifestations of harm or evidentiary factors listed by the EEOC. Petitioners suggest [Pet. 8] that an alleged hostile environment is itself proof of mental injury, but the EEOC policy statement provides, and the cases hold, that emotional injury may not be presumed. See *Biggs, supra* at 1305. (plaintiff must "show *'demonstrable* emotional distress,' not just point to circumstances of the constitutional violation which might support an inference of such injury.") (emphasis in original). Moreover, Brown disclaimed any right to damages based on a hostile environment. [Resp. App. 9a].

Finally, Petitioners rely on numerous cases cited in the EEOC policy guide to support their position that medical evidence is not a prerequisite for recovery. [Pet. 16]. Since the Fifth Circuit did not and does not require medical evidence, those cases do not conflict with the opinion below. The decision below is consistent with EEOC policy.

D. THE DECISION BELOW CORRECTLY HOLDS THAT FACTORS OTHER THAN A MANAGER'S CONDUCT MAY BE CONSIDERED WHEN DETERMINING WHETHER TO AWARD PUNITIVE DAMAGES AGAINST A CORPORATE EMPLOYER.

Petitioners' second point argues that the Fifth Circuit required Petitioners to provide "proof of malicious or reckless conduct of corporate officials" in order to recover punitive damages. [Pet. 19]. An examination of

the Fifth Circuit's decision, however, reveals that no such requirement has been imposed. Indeed, the court below recognized that "[i]t is well settled that a private employer may be held liable for punitive damages in employment discrimination cases under § 1981 based on the acts of supervisory employees." [Resp. App. 26a].

In reaching its decision, the court applied a standard of analysis that had been set forth more than a decade prior to this decision in *Jones v. Western Geophysical Co.*, 761 F.2d 1158 (5th Cir. 1985). In *Jones*, the Fifth Circuit held that when "determining whether punitive damages are appropriate . . . 'the nature of the conduct in question, the wisdom of some form of pecuniary punishment, and the advisability of a deterrent' " should be considered. *Jones*, 761 F.2d at 1162 (*quoting*, e.g., *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977)). Considering those factors, the court in *Jones* affirmed a decision not to award punitive damages because "[f]irst, there was evidence that the company was taking steps to eliminate racial harassment [and] [s]econd, the evidence in the district court was at times quite ambiguous and *did not compel* the conclusion that [the corporate employer] had behaved maliciously." *Jones*, 761 F.2d at 1162 (emphasis added).

Similarly, when deciding whether punitive damages could be awarded in this case, the Fifth Circuit took into account the following factors: (1) Kennedy was the sole person responsible for taking any discriminatory action; (2) Kennedy was not a corporate officer of PHP, but was the project manager of the Fort Hood office; (3) PHP provided a handbook which established a policy of non-discrimination and which explained how to complain of discriminatory practices to the Company; (4) memos were

distributed throughout the Fort Hood facility detailing the procedures for making complaints to headquarters; (5) neither Brown nor Patterson followed the aforementioned procedures in an attempt to notify PHP of Kennedy's discrimination, and (6) there was no evidence in the record to show that PHP had knowledge of Kennedy's malicious or reckless conduct, or that it had authorized, ratified or approved of his actions. [Resp. App. 30-31a]. Based on *all* of the aforementioned considerations, the court concluded that "the evidence *in this case* does not compel the conclusion that PHP behaved in a manner which warranted the imposition of punitive damages." [Resp. 31a, n.15, emphasis added]. In short, the Fifth Circuit held that it is appropriate to consider the totality of the circumstances surrounding an act of discrimination when determining whether an employer should be held liable for punitive damages.

The opinion below is consistent with the teachings of this Court which hold that "[a]n individual who establishes a cause of action under § 1981 is entitled to both equitable and legal relief, including compensatory and, *under certain circumstances*, punitive damages." *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 460, 95 S. Ct. 1716, 1720 (1975) (emphasis added). This Court has further held that it is error to "entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case" when determining liability under Title VII. *Meritor Savings Bank, F.S.B. v. Vinson*, 477 U.S. 57, 73, 106 S. Ct. 2399, 2408 (1986). In *Meritor*, this Court noted that, while Congress "wanted courts to look to agency principles for guidance" with respect to

employer liability, "such common-law principles may not be transferrable in all their particulars to Title VII," since "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible." *Id.*

A "key feature of punitive damages" is that they are "never awarded as of right, no matter how egregious the defendant's conduct. . . . Compensatory damages, by contrast, are mandatory; once liability is found, the jury is required to award compensatory damages in an amount appropriate to compensate the plaintiff for his loss." *Smith v. Wade*, 461 U.S. 30, 52, 103 S. Ct. 1625, 1638 (1983). "Punitive damages are awarded in the jury's discretion 'to *punish* [the defendant] for his outrageous conduct and to *deter* him and others like him from similar conduct in the future.' " *Id.* at 54; 103 S. Ct. at 1639 (emphasis added). Thus, "[t]he focus is on the character of the tortfeasor's conduct – whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards." *Id.* "That purpose is not served by the imposition of [punitive] charges upon a person who is responsible for the tort only vicariously, without any personal blame. . . . a principal will not be held liable for punitive damages for his agent's conduct without a showing that he 'participated in the doing of such wrongful act or had previously authorized or subsequently ratified it with full knowledge of the facts.' " *Jordan v. Medley*, 711 F.2d 211, 216 (D.C. Cir. 1983). For these reasons, a corporate employer can be held liable for compensatory damages based on the actions of its employees but liability for punitive damages is separate,

discretionary, and requires considerations besides the conduct of the employees themselves. There is no basis to grant certiorari on the ground that the Fifth Circuit has "distanced itself from the teachings of this Court" [Pet. 19] by taking into account the totality of the circumstances.

E. THE OTHER CIRCUITS CONSIDER FACTORS OTHER THAN A MANAGER'S CONDUCT WHEN DETERMINING WHETHER TO AWARD PUNITIVE DAMAGES AGAINST A CORPORATE EMPLOYER.

Petitioners' position on punitive damages is not merely that an employer *may* be liable for allegedly malicious conduct of an employer with managerial or supervisory authority, but, rather, that such employee's conduct *mandates* an award of punitive damages against a corporate employer in *every* case. Petitioners say that in failing to so hold the decision below is in conflict with other circuits. However, the other circuits have rejected that proposition.

In *Splunge v. Shoney's, Inc.*, 97 F.3d 488 (11th Cir. 1996), the district court found that an "area supervisor, with responsibility for multiple restaurants," a store manager, an assistant manager, and a dining room supervisor, all engaged in gender discriminatory activities and awarded compensatory and punitive damages against the employer. *Id.* at 489. The Eleventh Circuit determined that because the hostile environment was pervasive and the

offending employees were managers, constructive knowledge could be imputed to "higher management" for purposes of compensatory damages. *Id.* at 490. The Eleventh Circuit ruled, however, that the employer could not be held liable for punitive damages based solely on those managers' acts. *Id.* at 490-491. After reviewing the totality of the circumstances and noting that there was no evidence that "Shoney's failed to become aware of the hostile environment because of any established policy of willful blindness," and that "Shoney's had a general policy against . . . harassment and did investigate the complaints it received," the court declined to hold that "the state of mind of the harassing employees counts as the state of mind of Shoney's, the corporate employer, for punitive damages purposes". *Id.* at 491.

The Tenth Circuit also holds that an employer is not necessarily liable for punitive damages under section 1981 simply because the person responsible for the discrimination was an employee with sufficient authority to supervise or manage so as to make the employer liable for compensatory damages. In *Fitzgerald v. Mountain States Tel. and Tel. Co.*, 68 F.3d 1257 (10th Cir. 1995), the court held that "given [the employee's] role in the selection process of trainers," the actions of the employee could be attributed to the employer for purposes of awarding compensatory damages against the employer. *Id.* at 1263. The court, however, then held that "[p]unitive damages based solely on a respondeat superior theory are quite another matter." *Id.* Recognizing that "[a]ny intentional discriminatory conduct in this case occurred

at the hands of [the offending supervisor], not [the corporate employer]," the court conducted a two-part examination of the facts to determine whether there was sufficient evidence to support an award of punitive damages against the employer. *Id.* The court examined the "stature and authority of the agent . . . to set policy for the company" as well as whether the employer had conducted an investigation of the incident or ratified or approved the acts of the supervisor.[7] *Id.* at 1263-64. In spite of the fact that the offending supervisor had the final decision with respect to whether one of the plaintiffs would be awarded a contract, the court found that she was "not a manager with the type of authority necessary to impose vicarious liability on an employer for punitive damages." *Id.* at 1263-64. Based on the totality of the circumstances, the court remanded the case to the district court with instructions to dismiss the punitive damages claim. *Id.* at 1266.

Petitioners acknowledge that the Seventh Circuit has held that "a principal is liable for punitive damages for the discriminatory acts of her agent only if she knew of or

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[7] Petitioners cite *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993), for the principle that if an individual "serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment, . . . the individual operates as the alter ego of the employer, and the employer is liable for the unlawful . . . practices of the individual without regard to whether the employer knew of the individual's conduct." *Id.* at 1125. However, in *Sauers*, the court was merely considering whether to affirm a judgment in favor of defendants on issues of liability, and did not even discuss the issue of whether the above quoted standard should be applied for punitive damages.

ratified the acts" (Pet. 21, n.7) (*citing Hamilton v. Svatik*, 779 F.2d 383, 389 (7th Cir. 1985); *Chicago v. Matchmaker Real Estate Sales Ctr., Inc.*, 982 F.2d 1086, 1100 (7th Cir. 1992), *cert. denied*, 508 U.S. 972, 113 S. Ct. 2961 (1993)). The *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3rd 1344 (7th Cir. 1995) case also shows that the Seventh Circuit considers several factors when determining if a corporate employer may be held liable for punitive damages for the conduct of a mid-level employee. In deciding to uphold punitive damages awarded against an employer for sex discrimination under Title VII, the *Hennessy* court considered both the fact that plaintiff's supervisor had acted with reckless indifference to the female plaintiff's rights *and* testimony of Penril's president that he did not want to hire women in the field.[8] *Id.* at 1354.

Likewise, the Second, Third, and Sixth Circuits have all held that an employer is liable for punitive damages for the conduct of his employee-agent when there is evidence that the employer was by action or knowledgeable inaction, involved in the wrongdoing, or that the employer authorized, ratified or approved the acts complained of. See *Fort v. White*, 530 F.2d 1113, 1117 (2nd Cir. 1976); *Marr v. Rife*, 503 F.2d 735, 744-45 (6th Cir. 1974); *Miller v. Apartments and Homes of N.J., Inc.*, 646 F.2d 101, 111 (3rd Cir. 1981).[9]

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[8] *Hunter v. Allis-Chalmers Corp., Engine Div.*, 797 F.2d 1417 (7th Cir. 1986), cited by Petitioners, is not in conflict with the court below. Review of that case shows the court considered numerous factors including the corporate employer's failure to take remedial measures after learning of the harassment.

[9] The *Erebia* case, *supra*, confirms the lack of a conflict among the circuits. There, the court affirmed the jury's award

Petitioners claim *Block v. R.H. Macy & Co., Inc.*, 712 F.2d 1241 (8th Cir. 1983), stands for the proposition that courts have rejected an argument that "it is not appropriate to award punitive damages against a corporate defendant in the absence of evidence 'that the executive decision makers were racially motivated or biased.' " [Pet. 21]. In fact, the Eighth Circuit applied the same analysis that was applied by the Fifth Circuit, but simply came to a different conclusion under the facts of that case. Factored into the decision to award punitive damages was the company's knowledge of racial bias and failure to investigate. *Id.* at 1247.

Also instructive in the Eighth Circuit is *Kimzey v. Wal-Mart Stores, Inc.*, 907 F. Supp. 1309 (W.D. Mo. 1995), another decision cited by Petitioners. When discussing the issue of whether the jury's decision to award punitive damages should be overturned, the district court did not rely solely on agency principles, despite the fact that one of the offending employees had control over the terms and conditions of employment. *Id.* at 1313-14. Instead, the court noted that the plaintiff had complained about the harassment, that the corporate employer had failed to conduct an adequate investigation, and that the employer had offered the plaintiff alternative positions which did not have the same benefits and hours as plaintiff's prior

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for punitive damages, holding that it was supported by substantial evidence, but the court took into account the plaintiff's attempt to invoke investigatory procedures, the company's failure to investigate those claims properly and the threats made by the personnel manager to the plaintiff.

job. *Id.* at 1314. Thus, the court considered both the supervisor's and the company's conduct when determining whether to uphold punitive damages.

Petitioners also cite *Mitchell v. Keith*, 752 F.2d 385 (9th Cir.), *cert. denied*, 472 U.S. 1028, 105 S. Ct. 3502 (1985), for the principle that a corporate employer is vicariously liable for punitive damages brought about by the conduct of a manager or employee. [Pet. 19-20]. The court in *Mitchell*, however, articulated a permissive, rather than mandatory, test for punitive damages ("punitive damages also *may* be imposed, in the absence of proof of fault on the part of the corporation, when the wrongful actor is a managerial employee") and specifically noted that it was deciding the case based on California state law. *Mitchell*, 752 F.2d at 389-90 (emphasis added).

Petitioners seek to impose a standard of liability that would automatically impute liability for punitive damages to a corporate employer upon a finding of malicious conduct by a single managerial employee and abandon the totality of circumstances standard which has been followed in the Fifth Circuit and other circuits. Neither Title VII nor Section 1981 nor the circuits would require the imposition of such a *per se* standard.

CONCLUSION

This case raises no issue worthy of review by this Court. Respondents respectfully request that the petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A

[Filed July 25, 1996]

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50319

DONNA PATTERSON; NICHOLAS BROWN,
Plaintiffs-Appellees,

and

MICHAEL L. ADAMS,

versus *Plaintiff,*

P.H.P. HEALTHCARE CORPORATION; MARK KENNEDY,
Defendants-Appellants.

Appeal from the United States District Court
For the Western District of Texas

Before DUHÉ, BARKSDALE, and DEMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

Nicholas Brown, Michael Adams [1] and Donna Patterson brought suit against PHP Healthcare Corporation and

[1] The district court entered partial summary judgment in this case and ordered that Michael Adams recover nothing from PHP Healthcare and Kennedy. Adams filed no appeal.

Mark Kennedy in state court alleging various employment discrimination and retaliation claims. PHP Healthcare and Kennedy removed the case to federal court pursuant to 28 U.S.C. § 1441(b). Brown, a black male, alleged that he was constructively discharged from his position as a mental health technician and discriminated against because of his race in violation of 42 U.S.C. § 1981.[2] Patterson, the head nurse at PHP Healthcare's Fort Hood facility, alleged violations of 42 U.S.C. § 2000e-3 for retaliatory discharge based on her opposition to Mark Kennedy's discriminatory hiring practices and Kennedy's discrimination against Brown.[3] After a bench trial, the district court entered judgment in favor of Brown and Patterson and awarded compensatory and punitive damages. For the forthcoming reasons, we affirm in part and reverse in part.

I.

On July 1, 1991, PHP Healthcare began providing psychiatric services under a fixed price contract for the United States Army personnel at the Darnell Army Community Hospital in Fort Hood, Texas. PHP Healthcare, a private corporation employing more than 500 employees, assembled the following people as the "core" staff for this new project in Fort Hood: the project manager,

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[2] Brown and Adams also alleged that PHP Healthcare and Kennedy retaliated against them for engaging in protected speech in violation of 42 U.S.C. § 1983. Brown, Adams and Patterson additionally alleged retaliatory discharge based on reports they made to PHP Healthcare's headquarters concerning fraudulent billing practices. The district court entered partial summary judgment in favor of PHP Healthcare and Kennedy on these claims. No appeal was taken.

[3] The district court dismissed Patterson's state law claims and her Title VII claims against Kennedy on motion for summary judgment. *See Grant v. Long Star Co.*, 21 F.3d 649, 651-52 (5th Cir.), *cert. denied*, 115 S. Ct. 574 (1994) (holding that private employees are protected from individual Title VII liability). Patterson did not raise these issues on appeal, and consequently, we do not consider the propriety of the district court's order.

Mark Kennedy; the head nurse, Donna Patterson; and the psychologist, Dr. Michael Adams. Donna Hood worked as Kennedy's administrative assistant.

In this two day trial, the district court heard testimony from Kennedy, Patterson, Brown, Dr. Adams and four other witnesses, and determined the validity and credibility of their statements. The district court heard testimony that in late July 1991, less than one month after the facility opened, Kennedy met individually with each of his black employees to discuss a complaint that had been filed with the EEOC. Patterson testified that Kennedy, who is Caucasian, warned his black employees that he would not tolerate any EEOC complaints filed against PHP Healthcare. After the meetings, Kennedy told Patterson that "these stupid niggers need to understand I carry a big stick." At trial, Kennedy could not recall the reason for these meetings and did not refute Patterson's testimony.

Brown and Patterson testified that Kennedy scheduled black mental health technicians almost exclusively to the less desirable night shift. Further, Brown was forced to wait six months before receiving his shift differential upon becoming a full-time employee, while PHP Healthcare promptly resolved a similar problem with a white employee after one month. The district court also heard testimony that a white technician, James Tzcap, received a promotion to mental health technician supervisor while Brown was overlooked for the job.

In March 1992, a meeting was held in which black employees complained about being assigned to the less desirable night shift. Dr. Adams and Patterson testified that, after this meeting, Kennedy told Patterson that "not another nigger is to be hired." The district court also heard testimony from Dr. Adams, Patterson and Janet Berry (a current employee of PHP Healthcare) that Kennedy regularly referred to black employees as "porch monkeys," and "niggers" and considered black employees

to be "shiftless" and "lazy." Kennedy did not dispute using the term "porch monkey," however, he testified that he was only joking when he used the term and attributed his use of the term to a joke told by Patterson. He also denied ever referring to his employees as "niggers."

In August 1992, Patterson hired another black mental health technician, Eddie Harris. A few days later, Kennedy left for PHP headquarters for a meeting. When he returned on August 17, 1992, Kennedy fired Patterson. Appellants PHP Healthcare and Kennedy contend that Patterson was fired because she took a three hour lunch while Kennedy was at corporate headquarters. Appellants also argue that Patterson reported for work late on August 10 and that she did not show up for work on August 11. Because of her absence on August 11, a patient escaped from the hospital.

After her termination, Patterson filed a claim with the Texas Employment Commission. Kennedy submitted a document at the T.E.C. hearing which listed PHP Healthcare's reasons for firing Patterson. Kennedy admittedly created this document and back-dated it for use at the T.E.C. hearing. The document included the above details of Patterson's alleged inappropriate conduct. PHP Healthcare and Kennedy contend that the document, in concert with Patterson's inability to work constructively with Hood (Kennedy's assistant), her regular tardiness in March, April and May 1992, and Patterson's insubordinate attempts to assist Brown, were valid reasons to terminate her employment.

Patterson never saw this document until the T.E.C. hearings because Kennedy created it expressly for the hearing. Further, one month before her termination, Patterson had received favorable marks in all categories on her employment evaluation. PHP Healthcare's employment manual also required two verbal warnings and a written warning prior to termination. Patterson received no such reprimands.

PHP Healthcare and Kennedy attempted to identify problems with Brown's performance as well. Brown received numerous disciplinary actions, including verbal counseling from Patterson about his tardiness and his tendency to call in sick before and after scheduled days off. Patterson also counseled Brown about agreeing to work for other technicians and then failing to show up. Brown received a written warning about his attendance problems in June 1992 and was placed on probation in July.

However, Kennedy threatened to impose disciplinary action on Brown under highly unusual circumstances involving falsified memos and other documents based on unexcused absences. Brown testified that Kennedy twice threatened him with disciplinary actions based on falsified memos and reports. Patterson corroborated Brown's testimony and Kennedy did not refute his use of questionable documentation of Brown's conduct. After Patterson was fired, the new head nurse, Becky Simpson, told Brown that she had no interest in hearing from any mental health technician except for the white technician, James Tzcap.

Based on this ongoing array of work related problems, Brown tendered his resignation on September 1, 1992, effective September 4, 1992. On September 1, Brown received a call from John Bucur, a PHP Healthcare official from the corporate headquarters, who arranged a telephone conference with Brown and Kennedy later that afternoon. In this meeting, Brown explained his problems with the work environment. Bucur assured Brown that the work environment would change. Later that afternoon, Brown asked to withdraw his resignation. Kennedy told him that he was no longer needed at PHP Healthcare and that his position had been filled. At the time of trial Kennedy was no longer an employee of PHP Healthcare having been terminated on April 27, 1994. Kennedy was terminated from PHP Healthcare after he gave the primary part of his deposition in this lawsuit.

The district court entered the following findings of fact and conclusions of law in favor of Brown and Patterson: The district court found that Kennedy repeatedly and routinely used racial slurs, including "porch monkey" and "nigger," and used these terms in referring to Brown as well as other black employees. When black employees were terminated or left PHP Healthcare, Kennedy routinely replaced them with white employees.

The district court also found that PHP Healthcare and Kennedy discriminated against Brown on the basis of his race by limiting his work schedule, assigning him certain menial duties that were not performed by white employees, denying him an opportunity for promotion, falsifying documents in order to take disciplinary actions against him, and by constructively terminating him. With respect to Brown's resignation, the district court found that Brown withdrew his resignation in a timely manner after PHP Healthcare's headquarters convinced him that the hostile work environment would be improved. Kennedy then refused to allow Brown to withdraw the resignation which constituted a constructive discharge. Essentially, Brown was retaliated against and terminated for his complaints of racial problems at the hospital. He was replaced by a white employee. The district court found the reasons given by PHP Healthcare and Kennedy for Brown's dismissal to be pretexts for racial discrimination.

The district court entered a final judgment in favor of Brown against PHP Healthcare and Kennedy holding them jointly and severally liable for intentional discrimination in violation of 42 U.S.C. § 1981. The district court awarded damages of $22,648 in lost income and benefits,[4] $40,000 for emotional damage and $150,000

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[4] Brown testified that he worked 50 hours per week for PHP Healthcare. Of those 50 hours, 25 hours were usually from night and weekend shifts which earned an additional eight percent shift differential. Therefore, the district court arrived at $22,648 by

in punitive damages to Brown. The court based its award of punitive damages on the willful and malicious discrimination evidenced in this case.

As to Patterson, the district court found that she contacted PHP Healthcare's headquarters to call attention to Kennedy's discriminatory actions. In March 1992, after meeting with each black employee about complaints of race discrimination, Kennedy told Patterson that "not another nigger is to be hired." In August 1992, Patterson needed another mental health technician and hired a black employee, Eddie Harris.

Patterson's actions in contacting PHP Healthcare's headquarters and in hiring another black employee were the producing causes of her termination. Kennedy prepared a document setting forth his reasons for terminating Patterson; however, the document was prepared after the termination and back-dated by Kennedy and Dr. Chaparala, the medical director. Kennedy then lied about using the document to terminate Patterson when he testified before the Texas Employment Commission. Based on these facts, the district court found that Patterson was terminated because she hired a black technician in contravention to an illegal directive given to her by Kennedy.

The district court awarded lost income and benefits of $40,000,[5] $150,000 for emotional damage and pain and suffering, and $150,000 in punitive damages against PHP Healthcare based on Patterson's 42 U.S.C. § 2000e-3 claim. The district court further found that both Brown

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calculating (25 hours x $6.19 per hour = $154.75) + (25 hours x $6.69 per hour = $167.25) = $322 weekly wage and factoring on various earnings in mitigation.

[5] Patterson testified without dispute that her actual lost wages were in excess of $40,000. She explained that she was a salaried employee of PHP Healthcare and received $36,650 per year or approximately $17.68 per hour.

and Patterson were entitled to attorneys' fees pursuant to 42 U.S.C. § 1988.

II.

Appellants PHP Healthcare and Kennedy raise a number of arguments attacking the district court's legal conclusions based on improper burden shifting and erroneous legal cause findings under *McDonnell Douglas*.[6] PHP Healthcare and Kennedy first argue that the district court erred in finding that Kennedy's racial slurs constituted direct evidence of discrimination. Next, appellants contend that the district court erred in finding a nexus between Patterson's actions opposing Kennedy's discrimination and hiring practices and her termination under 42 U.S.C. § 2000e-3. Third, appellants maintain that the district court failed to specially find facts as required by FED. R. CIV. P. 52(a). Fourth, PHP Healthcare and Kennedy contend that the district court erred in finding that appellants' acts of racial discrimination affected the terms and conditions of Brown's employment in violation of 42 U.S.C. § 1981. Finally, appellants argue that the district court erred in finding that Brown was constructively discharged.

We address these arguments together. After a case has been fully tried on the merits, the *McDonnell Douglas*[7] burden shifting analysis ceases to be of import to an appellate court. *Haun v. Ideal Indus., Inc.*, 81 F.3d 541, 546 (5th Cir. 1996); *Molnar v. Ebasco Constructors, Inc.*, 986 F.2d 115, 118 (5th Cir. 1993). Instead, our inquiry becomes whether the record contains sufficient evidence to support the conclusions reached by the trier

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[6] *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

[7] In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), the Supreme Court set out the burden shifting ritual used in cases brought under Title VII.

of fact. *Haun*, 81 F.3d at 546; *Molnar*, 986 F.2d at 118.

In making this assessment, the district court's factual findings are examined for clear error pursuant to FED. R. CIV. P. 52(a). *See EEOC v. Clear Lake Dodge*, 60 F.3d 1146, 1151 (5th Cir. 1995). Under this standard, we reverse a district court's judgment based on erroneous fact findings only when, after weighing the evidence, we are definitely and firmly convinced that a district court made a mistake. *Id.* "Where the court's finding is based on its decision to credit the testimony of one witness over that of another, 'that finding, if not internally inconsistent, can virtually never be clear error.' " *Schlesinger v. Herzog*, 2 F.3d 135, 139 (5th Cir. 1993) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)). After a thorough review of the record, we find ample evidence supporting the district court's findings as to liability and, therefore, this case presents no clear error in that regard.

III.

PHP Healthcare and Kennedy also contend that the district court erred in allowing Brown to amend his pretrial order to raise a hostile work environment claim. Brown points out that he received no monetary award for his hostile work environment claim and, in any event, evidence of PHP Healthcare's hostile work environment would have been admitted in support of Brown's intentional race discrimination claim under § 1981.

The Federal Rules of Civil Procedure allow a district court to freely grant leave to amend when justice so requires. FED. R. CIV. P. 15(a). We review the district court's decision to grant or to deny leave to amend for abuse of discretion. *Engstrom v. First Nat. Bank of Eagle Lake*, 47 F.3d 1459, 1464 (5th Cir.), *cert. denied*, 116 S. Ct. 75 (1995). In this case, permitting Brown's amendment did not surprise, prejudice, or delay the appellants' defense. Brown's 42 U.S.C. § 1981 claim should

have alerted PHP Healthcare and Kennedy to the type of evidence that would be elicited in this case. Here, Brown's hostile work environment claim is not so different from his intentional discrimination claim so as to surprise PHP Healthcare or Kennedy and prejudice their defense. Further, the district court did not award damages based on the hostile work environment claim.

PHP Healthcare and Kennedy failed to present evidence demonstrating that the district court's decision to grant Brown's amendment prejudiced their defense of this case. As such, we find no abuse of discretion in the district court's decision to grant leave to amend.

IV.

PHP Healthcare and Kennedy next challenge the district court's award of back pay and reinstatement to Brown based on evidence of Brown's failure to disclose his prior criminal conviction. The Supreme Court recently set out the applicable standard for determining whether, and to what extent, after-acquired evidence affects a damage award under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 621 *et seq.*, and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* *See McKennon v. Nashville Banner Pub. Co.*, 115 S. Ct. 879 (1995). In *McKennon*, the Court held that evidence of employee wrongdoing after termination does not immunize an employer from liability under Title VII; the wrongdoing, however, may affect the remedy available to the employee. *Id.* at 886-887. In assessing the effect of after-acquired evidence, *McKennon* explains:

> Where an employer seeks to rely upon after-acquired evidence of wrongdoing, it must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge.

Id. at 886-887; *and see Shattuck v. Kinetic Concepts, Inc.*, 49 F.3d 1106, 1108 (5th Cir. 1995) (citing same).

PHP Healthcare's employment application asked, "[h]ave you ever pleaded guilty to or been convicted of any criminal offense, excluding minor traffic citations?" Brown answered no. The application also asked whether Brown was currently serving probation or any deferred adjudication for a criminal offense. Again, Brown answered no. PHP Healthcare's Vice President of Human Resources, John Bucur, testified that a prior conviction would not necessarily bar an applicant from working at PHP Healthcare. Bucur stated, however, that application fraud would result in that employee's immediate dismissal.

Brown admits that he was convicted of burglary in 1982 and sentenced to ten years probation. Brown, however, testified that his probation officer told him that once he completed the probation and paid restitution, his conviction would be expunged. Further, both Patterson and Brown testified that Kennedy knew of Brown's prior conviction when the trio worked together at the Greenleaf Center. The district court made fact findings in support of Brown's testimony. The district court believed Brown's testimony that his probation officer told him that it was unnecessary to notify employers of an expunged conviction. Consequently, the district court found that Brown truthfully completed his employment application. Based on Patterson's and Brown's testimony, the district court also found that PHP Healthcare and Kennedy knew about Brown's prior conviction. Finally, the district court found that PHP Healthcare would not have immediately terminated Brown even if they had not known of the prior conviction. As such, the district court concluded that PHP Healthcare failed to establish that "the wrongdoing was of such severity that [Brown] in fact would have been terminated on those grounds alone if [PHP Healthcare] had known of it at the time of the discharge. *McKennon*, 115 S. Ct. at 886-887.

In determining whether the district court erred in finding that Brown would not have been terminated based on his submission of a false employment application, we are again faced with a clear error review which turns on the district court's credibility assessments. After reviewing the record as a whole, including the testimony of Patterson, Brown, Kennedy and Bucur, we defer to the findings of the district court. Even if PHP Healthcare did not have imputed knowledge of Brown's prior conviction, we are not convinced that Brown's failure to include his 10 year-old conviction on his employment application was so severe that PHP Healthcare would have terminated him based on this after-acquired knowledge. The district court's decision to award back pay and reinstatement does not leave us with a firm and definite conviction that a mistake has been made and, as such, we find no clear error.

V.

Next, PHP Healthcare and Kennedy argue that the district court committed clear error in finding that Patterson and Brown mitigated their damages. *Sellers v. Delgado College,* 902 F.2d 1189, 1193 (5th Cir.) (*Sellers III*), *cert. denied,* 498 U.S. 987 (1990) (recognizing that successful Title VII claimants have statutory duty under 42 U.S.C. § 2000e-5(g) to mitigate damages). We recognize that no such statutory duty exists to mitigate damages under 42 U.S.C. § 1981. Nevertheless, we are guided by the statutory duty to mitigate damages under § 2000e-5(g) based on the nature of the equitable relief sought by the claimant. *See Whiting v. Jackson State Univ.,* 616 F.2d 116, 122 n.3 (5th Cir. 1980) ("No chameleon-like change in the nature of the relief is experienced simply because it is sought under sister provisions in the federal statutes.").

Further, the Supreme Court has recognized that the duty to mitgate damages, "rooted in an ancient principle of law, requires the claimant to use reasonable diligence

in finding other suitable employment." *Ford Motor Co. v. EEOC*, 458 U.S. 219, 231 & n.15 (1982) (footnote omitted). Because an award of back pay is an equitable remedy designed to make the injured party whole, we are persuaded that an injured party has a duty under both § 1981 and Title VII to use reasonable diligence to attain substantially similar employment and, thereby, mitigate damages. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975) (recognizing that " 'the remedies available to the individual under Title VII are co-extensive with the indiv[i]dual's right to sue under the provisions of the Civil Rights Act of 1866, 42 U.S.C. § 1981, and that the two procedures augment each other and are not mutually exclusive.' ") (quoting H.R. REP. No. 92-238, at 19 (1971)). As such, we adopt the statutory requirement to exercise reasonable diligence to attain substantially similar employment as a prerequisite to obtaining back pay under § 1981.

In the present case, no party disputes that Brown attained substantially equivalent employment. Instead, PHP Healthcare and Kennedy argue that Brown failed to exercise reasonable diligence to maintain such comparable employment and should not receive back pay for the period after his involuntary termination of the substantially similar employment. We agree.

The Supreme Court requires successful Title VII claimants to use "reasonable diligence" to obtain "substantially equivalent" employment. *Ford Motor Co.*, 458 U.S. at 232. The claimant must exercise reasonable diligence in both seeking and maintaining substantially equivalent employment in order to effectuate the reasonable diligence requirement. *See Brady v. Thurston Motor Lines, Inc.*, 753 F.2d 1269, 1277 (4th Cir. 1985) (holding that forcing the Title VII defendants to pay for the claimant's misconduct in her subsequent employment is not properly related to the objective of the back pay requirements). Substantially equivalent employment has been defined as " 'employment which affords virtually identical

promotional opportunities, compensation, job responsibilities, working conditions, and status as the position from which the Title VII claimant has been discriminatorily terminated.'" *Sellers III*, 902 F.2d at 1193 (quoting *Sellers v. Delgado College*, 839 F.2d 1132, 1138 (5th Cir. 1989) (*Sellers II*)).

The Fourth Circuit explained that a Title VII claimant has a duty to exercise reasonable diligence to maintain subsequent employment when that employment is substantially similar to the claimant's prior position. *Brady*, 753 F.2d at 1277. This duty includes an obligation "to make reasonable and good faith efforts to maintain that job once accepted." *Id.* We find this reasoning persuasive. By adopting a requirement to use "reasonable and good faith" effort to maintain employment, reasonable diligence becomes a two part test. First, the claimant must exercise reasonable diligence in obtaining substantially similar employment. *Ford Motor Co.*, 458 U.S. at 232; *and see Sellers III*, 902 F.2d at 1193. Second, in order to give effect to the statutory requirement to use reasonable diligence, it necessarily follows that the claimant must also use reasonable diligence in maintaining that substantially similar employment. *Brady*, 753 F.2d at 1277.

In this case, the district court found that Brown was constructively terminated from PHP Healthcare on September 1, 1992. Brown began working for Metroplex, another mental Healthcare provider, on September 8, 1992. Brown was then terminated from Metroplex on April 14, 1993. Kim Henry, the director of nursing at Metroplex, testified that Brown was fired for excessive absences, making personal phone calls and for his conflicts with another staff member. Brown concedes that he was involuntarily terminated from his job as a mental health technician for Metroplex.

We review the district court's determination of whether a claimant used reasonable diligence in attaining and maintaining substantially similar employment as a finding of

fact subject to reversal for clear error. FED. R. CIV. P. 52(a); *Rhodes v. Guiberson Oil Tools*, 82 F.3d 615, 621 (5th Cir. 1996) (en banc). As such, if the district court's findings are plausible in light of the evidence presented, we may not reverse its decision even if we would have reached a different conclusion. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985).

Here, the district court's damage award included back pay [8] from the date Brown was terminated from Metroplex, April 14, 1993, through December 1993.[9] While we recognize the remedial purposes of this statute generally permit back pay relief in all but "special circum-

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[8] "Back pay" commonly refers to the wages and other benefits that an employee would have earned if the unlawful event that affected the employee's job related compensation had not occurred. *See Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197 (1941). On the other hand, "front pay" is an equitable remedy referring to future lost earnings. Front pay is usually invoked when reinstatement is impracticable and is calculated from the date of judgment to age 70, or the normal retirement age, and should reflect earnings in mitigation of damages. *See* J. Hardin Marion, *Legal and Equitable Remedies Under the Age Discrimination in Employment Act*, 45 MD. L. REV. 298, 330-334 (1986).

[9] When calculating back pay damages, 42 U.S.C. § 2000e-5(g)(1) (1994) provides in pertinent part:

> If the court finds that the respondent has intentionally engaged in . . . an unlawful employment practice charged in the complaint, the court may . . . order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate. *Back pay liabiilty shall not accrue from a date more than two years prior to the filing of a charge with the Commission.* Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

(Emphasis added).

stances," this case presents such a circumstance.[10] Brown was directly responsible for his loss of employment with Metroplex. The record indicates that Brown was fired from Metroplex on April 14, 1993, because of excessive absences, excessive use of the company phone for personal phone calls and for his conflicts with another staff member. Brown presented no evidence disputing the reasons given for his termination. Consequently, we hold that the district court's back pay assessment was clearly erroneous. We hold that a § 1981 claimant who attains employment substantially equivalent to the employment from which the claimant was unlawfully discharged has a duty "to make reasonable and good faith efforts to maintain that job once accepted." *Brady*, 753 F.2d at 1277. Brown breached this duty by acting in such a manner that caused his involuntary termination from Metroplex. By failing to make a reasonable and good faith effort to keep his job at Metroplex, Brown effectively removed himself from the job market for purposes of receiving back pay. *See id.; Ford Motor Co.*, 458 U.S. at 231-232. Therefore, we vacate the district court's back pay award to Brown with respect to the period after his involuntary termination and remand for a new damage determination in light of our decision.

PHP Healthcare and Kennedy raise a similar argument contending that back pay was improperly awarded to Patterson under Title VII. To meet their burden of showing Patterson failed to mitigate her damages, PHP Healthcare and Kennedy must show that substantially equivalent work was available and that Patterson did not exercise reasonable diligence in attaining that employment. *See Sellers III*, 902 F.2d at 1193. After reviewing the record, we hold that the district court committed no clear error in finding that Patterson made a reasonable effort to mitigate her damages.

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[10] *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975) (recognizing that the statutory requirement to award back pay does not automatically attach in all circumstances).

Upon her discharge from PHP Healthcare, Patterson did take a job at Metroplex, but it was only part-time and lasted one month. Thereafter, Patterson testified that she attempted to attain employment but was unsuccessful. She finally got a job at the Huntsville prison working with psychiatric prisoners. Patterson testified that she worked in Huntsville for three months and then transferred to the Houston unit. Patterson worked in Houston for over one year before quitting and moving back to Gatesville, Texas, to live with her family. PHP Healthcare and Kennedy offered no evidence to show that substantially equivalent work was available nor did they show that Patterson failed to use reasonable diligence to attain substantially similar employment. Further, Patterson voluntarily resigned from her post-PHP Healthcare jobs. Unlike Brown, no evidence exists to show that Patterson breached her duty to mitigate damages. Therefore, we hold that the district court committed no clear error with respect to Patterson's back pay award.

VI.

Next, PHP Healthcare and Kennedy argue that the district court committed clear error in awarding $40,000 to Brown under 42 U.S.C. § 1981 and $150,000 to Patterson under Title VII for emotional damage and mental pain and suffering.

A. Section 1981—Emotional Harm.

We have recognized that emotional harm may be recoverable under § 1981. *Gore v. Turner*, 563 F.2d 159, 164 (5th Cir. 1977); *and see Johnson*, 421 U.S. at 460, 95 S. Ct. at 1720. Our standard of review for awards based on intangible harms such as mental anguish is deferential to the fact finder because "the harm is subjective and evaluating it depends considerably on the demeanor of witnesses." 1 HENRY H. PERRITT, JR., CIVIL RIGHTS IN THE WORKPLACE § 4.6, at 245 (2d ed. 1995); *see also Thompson v. San Antonio Retail Ass'n*, 682 F.2d 509, 513 (5th Cir. 1982).

Although we generally defer to the fact finder in determining intangible harms, an award is warranted only when a sufficient causal connection exists between the statutory violation and the alleged injury. *Gore*, 563 F.2d at 164. The Supreme Court has also required that compensatory damages such as emotional harm caused by the deprivation of constitutional rights may be awarded only when claimants submit proof of actual injury.[11] *Carey v. Piphus*, 435 U.S. 247, 255-56, 98 S. Ct. 1042, 1048 (1978). Therefore, a claimant must present testimony and/or other evidence to show the nature and extent of emotional harm caused by the alleged violation. In *Carey*, the Court stated:

> We use the term "distress" to include mental suffering or emotional anguish. Although essentially subjective, genuine injury in this respect may be evidenced by one's conduct and observed by others. Juries must be guided by appropriate instructions, and an *award of damages must be supported by competent evidence concerning the injury.*

Carey, 435 U.S. at 264 n.20, 98 S. Ct. at 1052 n.20 (emphasis added). A number of our sister circuits have recognized that a claimant's testimony alone may not be sufficient to support anything more than a nominal damage award. *See Fitzgerald v. Mountain States Telephone and Telegraph Co.*, 68 F.3d 1257, 1265 (10th Cir. 1995) (remanding an emotional damage award of $250,000 per plaintiff as clearly excessive when the award was based solely on the testimony of the plaintiffs; no physicians or psychologists testified and plaintiffs continued to work in their chosen fields.); *Gunby v. Pennsylvania Electric*

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[11] We have noted that while *Carey* refers to damage awards under 42 U.S.C. § 1983, "it is clear from the opinion as a whole that the Court's reasoning was not confined to § 1983." *Johnson v. IRS*, 700 F.2d 971, 977 n.11 (5th Cir. 1983). As a result, we apply the reasoning of *Carey* to cases involving federal claims for emotional harm.

Co., 840 F.2d 1108, 1121 (3d Cir. 1988), *cert. denied*, 492 U.S. 905 (1989) (reversing a § 1981 emotional distress award for $15,000 based on the lack of evidence to support such an award); *Erebia v. Crysler Plastic Prod. Corp.*, 772 F.2d 1250, 1259 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986) (reversing a § 1981 emotional damage award of $10,000 and remanding with instructions to award nominal damages because plaintiff offered only his own testimony); *Vance v. Southern Bell Telephone and Telegraph Co.*, 863 F.2d 1503, (11th Cir. 1989), *cert. denied*, 115 S. Ct. 1110 (1995) (affirming the district court's finding that the jury's award of $500,000 for emotional distress was grossly excessive when based solely on plaintiff's testimony that her hostile work environment caused her mental distress).

In many instances, corroborating testimony and evidence of medical or psychological treatment have been relied upon to support an award of emotional harm or mental anguish. *See Rowlett v. Anheuser-Busch*, 832 F.2d 194, 204-05 (1st Cir. 1987) (affirming § 1981 emotional damage award of $123,000 based on plaintiff's testimony and testimony from psychiatrist); *Cowan v. Prudential Ins. Co. of America*, 852 F.2d 688, 690-91 (2d Cir. 1988) (affirming § 1981 emotional damage award of $15,000 based on testimony of plaintiff, his wife and co-workers about the stress, humiliation and emotional distress suffered); *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 922 (8th Cir. 1986) (affirming § 1981 damage award of $400,000 based on testimony of plaintiff and other witnesses). For example, in *Rowlett v. Anheuser-Busch, Inc.*, the First Circuit affirmed an emotional distress award of $123,000 to a black employee under § 1981 based on plaintiff's testimony that he was under continuous stress over a seven year period, he never received the proper training promised by management, he feared that he would make a mistake and be discharged because of his lack of training, and, after his discharge, he was unemployed and suffered emotional problems. *Rowlett*,

832 F.2d at 204-205. Rowlett also presented expert testimony of a psychiatrist who explained that he suffered from symptoms of anxiety, stress, and some depression for which he was treated with an antidepressant. *Id.* at 204. The court then held that "Rowlett's testimony, in combination with that of the psychiatrist and with the jury's common sense judgment of the emotional complications that would accompany the intentional discrimination Rowlett suffered, provides an adequate basis for the portion of the compensatory damage award attributable to emotional distress." *Id.*

The EEOC, as the primary enforcement mechanism against discrimination under Title VII, apparently recognized this trend in case law and interpreted the 1991 Amendments allowing compensatory damages under Title VII to similarly require physical manifestations to recover for emotional harm. EEOC POLICY GUIDANCE NO. 915.002 § II(A)(2), at 10 (July 14, 1992). The Commission's position statement noted that "[c]ases awarding compensatory and punitive damages under other civil rights statutes will be used as guidance in analyzing the availability of damages under § 1981a. Section 1981 case are particularly useful because Congress treated the § 1981a damage provisions as an amendment to § 1981." *Id.* at 10 n.13. The Commission then explained its position on the availability of intangible injury under § 1981a as follows:

> Damages are available for the intangible injuries of emotional harm such as emotional pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. Other nonpecuniary losses could include injury to professional standing, injury to character and reputation, injury to credit standing, loss of health, and any other nonpecuniary losses that are incurred as a result of the discriminatory conduct. Nonpecuniary losses for emotional harm are more difficult to prove than pecuniary losses.

> *Emotional harm will not be presumed simply because the complaining party is a victim of discrimination.*[] *The existence, nature, and severity of emotional harm must be proved.* Emotional harm may manifest itself, for example, as sleeplessness, anxiety, stress, depression, marital strain, humiliation, emotional distress, loss of self esteem, excessive fatigue, or a nervous breakdown. Physical manifestations of emotional harm may consist of ulcers, gastrointestinal disorders, hair loss, or headaches . . . . The Commission will typically require medical evidence of emotional harm to seek damages for such harm in conciliation negotiations.

Id. at 10-12 (footnotes omitted) (emphasis added).

In the instant case, the district court awarded $40,000 for emotional distress to Brown based solely on his testimony and the discriminatory conduct forming the basis of this lawsuit. Brown testified that he felt "frustrated" and "real bad" for being judged by the color of his skin. Brown explained that the work environment was "unbearable" and was "tearing my self-esteem down." Brown also stated that it "hurt" and made him "angry" and "paranoid" to know that his supervisor referred to Brown as a "porch monkey" or a "nigger" and generally thought that he was inferior to white employees. This testimony is the only evidence submitted by Brown in support of his emotional distress claim.

After a complete review of the record, we hold that Brown's testimony of mental distress is insufficient to support anything more than a nominal damage award. While the district court could infer that being referred to as a "porch monkey" and a "nigger" would cause one emotional distress, Brown has not presented evidence with the specificity required by *Carey* nor has Brown testified as to any manifestations of harm listed by the EEOC policy statement. *See* EEOC POLICY GUIDANCE No. 915.002 § II(A)(2), at 10-11. Brown presented no corroborating

testimony nor did he offer expert medical or psychological evidence of damages caused by his alleged distress. No evidence suggests that Brown suffered from sleeplessness, anxiety or depression. Furthermore, immediately after his constructive discharge from PHP Healthcare, Brown obtained employment at Metroplex for a higher hourly wage rate than he received at PHP Healthcare.

In order to establish intangible loss, we recognize that *Carey* requires a degree of specificity which may include corroborating testimony or medical or psychological evidence in support of the damage award. *Carey*, 435 U.S. at 264, 98 S. Ct. at 1052. Hurt feelings, anger and frustration are part of life. Unless the cause of action manifests some specific discernable injury to the claimant's emotional state, we cannot say that the specificity requirement of *Carey* has been satisfied. We find no support for the district court's emotional damage award in this record. Consequently, based on the above reasoning, we hold that the district court abused its discretion in awarding emotional distress damages to Brown on his § 1981 claim. We vacate the district court's $40,000 emotional distress award as to Brown and remand the case with instructions for the district court to award nominal damages.

B. Title VII—Emotional Harm

For purposes of Title VII, § 102 of the Civil Rights Act of 1991 significantly expanded the available remedies for plaintiffs subjected to discrimination under Title VII. 42 U.S.C. § 1981a; *and see Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1490-1491 (1994). Under this section, "a Title VII plaintiff who wins a back pay award may also seek compensatory damages for 'future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses.'" *Landgraf*, 114 S. Ct. at 1491 (quoting 42 U.S.C. § 1981a(b)(3)). As such, both § 1981

and Title VII permit awards for intangible loss such as mental anguish or emotional distress.

Nothing in the 1991 Amendments to Title VII suggests that we should analyze claims for emotional distress under Title VII using different guidelines than those explained above for § 1981 emotional distress claims.[12] Furthermore, Congress treated the § 1981a compensatory and punitive damage provisions as amendments to § 1981. The legislative history of the 1991 Amendments to Title VII also shows that Congress sought to unify the law for employment discrimination cases. H.R. REP. No. 102-40 (II), 102d Cong., 1st Sess. at 24 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717. As such, we see no reason to frustrate Congressional intent by fashioning different rules for § 1981 and Title VII claims. Consequently, we read *Carey* to require a plaintiff to present the same level of competent evidence under a Title VII emotional distress claim as is required to sustain a finding for emotional distress under §§ 1981 and 1983. *Carey*, 435 U.S. at 255-56, 98 S. Ct. at 1048.

We again review the district court's emotional damage award for abuse of discretion. The district court awarded Patterson $150,000 for emotional damage, and mental pain and suffering. Again, no testimony was presented to show any manifestations of harm listed by the EEOC policy statement. Patterson presented no evidence that she was subjected to sexist or racist comments nor did she testify that she was subjected to a hostile work environment. Instead, Patterson testified that she was terminated by Kennedy for insubordination for hiring another black employee. She also explained that Kennedy created and back-dated a document for use at her T.E.C. hearings in order to challenge her application for unemployment. Patterson also testified that her retaliatory firing emotionally scarred her and resulted in unemployment for

[12] We also recognize that nothing in the statute suggests that the same standards apply.

almost one year. Patterson explained that she worked in a narrow field as a psychiatric nurse and could not easily attain employment due to the limited number of facilities.

Apparently, the district court based its emotional harm award on testimony that Patterson suffered mental anguish during her unemployment, that she endured a great deal of familial discord arising from her acceptance of other jobs in Huntsville and Houston because she was forced to leave her children in the Gatesville area, and that the firing and subsequent moves to Huntsville and Houston to obtain work caused mental distress because she was separated from her children. Obviously, the retaliatory discharge caused a substantial disruption in Patterson's daily routine. However, this record is void of sufficient competent evidence to support anything more than nominal damages under *Carey*. *Carey*, 435 U.S. at 255-56, 98 S. Ct. at 1048.

The record contains none of the listed evidentiary factors in the EEOC policy statement. *See* EEOC POLICY GUIDANCE No. 915.002 at 10-11. No corroborating testimony was offered to support Patterson's testimony. No evidence suggests that Patterson was humiliated or subjected to any kind of hostile work environment. Further, no expert medical or psychological evidence exists to support a claim for emotional harm. No proof of actual injury exists in this case. Because Patterson failed to present sufficient competent testimony and/or other evidence to demonstrate the nature and extent of emotional harm caused by her unlawful termination, we hold that the district court abused its discretion in awarding her $150,000 for emotional distress. As we explained above, *Carey* teaches us that the an award of damages for "distress" "*must be supported by competent evidence concerning the injury*." *Carey*, 435 U.S. at 264 n.20, 98 S. Ct. at 1052 n.20 (emphasis added). Patterson's testimony alone does not meet this threshold. We therefore vacate the district court's Title VII emotional distress award and

remand to the district court with instructions to award nominal damages for Patterson's emotional distress.

VII.

Appellants PHP Healthcare and Kennedy also argue that the district court committed clear error by awarding punitive damages to Brown under 42 U.S.C. § 1981 and to Patterson under 42 U.S.C. § 1981a. A party who establishes a cause of action under 42 U.S.C. § 1981 may be entitled to punitive damages "under certain circumstances." *Johnson v. Railway Express Agency*, 421 U.S. 454, 460, 95 S. Ct. 1716, 1720 (1975). The general rule in this circuit permits a punitive damage award against a § 1981 defendant when the defendant acts willfully or with gross disregard for the plaintiff's rights. *See Jones v. Western Geophysical Co.*, 761 F.2d 1158, 1162 (5th Cir. 1985).[13] In *Jones*, we also recognized this characterization to be one of malice. *Id.* (citing *Clairborne v. Illinois Central R.R.*, 583 F.2d 143, 154 (5th Cir. 1978), *cert. denied*, 442 U.S. 934 (1979)).

Punitive damages were unavailable to Title VII plaintiffs until the enactment of the 1991 Amendments to the Civil Rights Act of 1964, 42 U.S.C. § 1981a. Congress's primary concern with enacting punitive damages under § 1981a(b)(1) was to unify the law under Title VII. H.R. REP. No. 102-40 (II), 102d Cong., 1st Sess. at 24-29 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717-723. In furtherance of this unification effort, Congress permitted the imposition of punitive damages under Title VII in the same general circumstances as punitive damage awards imposed by courts under § 1981. *Id.; and see* H.R. REP. No. 40(I), 102d Cong., 1st Sess. at 74 (1991),

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[13] The Supreme Court fashioned a similar standard for assessing punitive damages under § 1983. *Smith v. Wade*, 461 U.S. 30, 51, 103 S. Ct. 1625, 1637 (1983). In *Wade*, the Court held that punitive damages may be assessed under § 1983 when the defendant commits acts intentionally or with reckless or callous disregard for the plaintiff's rights. *Wade*, 461 U.S. at 51, 103 S. Ct. at 1637.

reprinted in 1991 U.S.C.C.A.N. 549, 612. Section 1981a provides that, for a district court to award punitive damages under Title VII, the complaining party must show "that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). "Punitive damages are available under [§ 1981a] to the same extent and under the same standards that they are available to plaintiffs under 42 U.S.C. § 1981. No higher standard may be imposed." 137 CONG. REC. H9527 (daily ed. Nov. 7, 1991) (Rep. Edwards' Interpretive Memorandum).

From our reading of the legislative history to the 1991 Amendments to Title VII, we can conclude that Congress intended these amendments to unify the law for employment discrimination cases. Accordingly, we shall consider the propriety of punitive damage awards under §§ 1981 and 1981a under the same criteria.

It is well settled that a private employer may be held liable for punitive damages in employment discrimination cases under § 1981 based on the acts of supervisory employees.[14] *Flanagan v. A.E. Henry Com. Health Serv. Ctr.*, 876 F.2d 1231, 1235 (5th Cir. 1989). Title VII, however, only provides for "employer" liability. 42 U.S.C. § 2000e-2. Although individuals may not be held liable under Title VII unless they meet § 2000e(b) definition of "employer," an individual employee's actions may subject the employer to liability under agency principles. *See Grant v. Lone Star Co.*, 21 F.3d 649, 652 (5th Cir.),

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[14] In *Flanagan*, we affirmed a district court's application of agency principles to extend liability under § 1981 to a private employer. *Id.* at 1236. We held that "in cases . . . where a clear agency relationship exists between the employer and supervisors with control over the operations of the employer and the employment status of the plaintiff, liability may be appropriately extended against the employer." *Id.*

cert. denied, 115 S. Ct. 574 (1994) (noting that "the purpose of the 'agent' provision in § 2000e(b) was to incorporate respondeat superior liability into Title VII."). The Supreme Court has also held that employers are not strictly liable under Title VII for the discriminatory acts of their agents. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 72, 106 S. Ct. 2399, 2408 (1986). As such, agency principles apply under Title VII and should necessarily be extended to the remedies made available under the 1991 Amendments, 42 U.S.C. § 1981a.

For punitive damages to be assessed under § 1981 or § 1983, the defendant must have committed acts with malice or reckless indifference to the federally protected rights of the plaintiff. *Jones*, 761 F.2d at 1162; 42 U.S.C. § 1981a(b)(1). We review the propriety of the district court's punitive damage award for abuse of discretion. *Id.*

In the case *sub judice*, the district court found that Brown and Patterson were subjected to willful and malicious discrimination and awarded Brown and Patterson $150,000 each in punitive damages. Kennedy was the project manager and supervisor for PHP Healthcare's Fort Hood Facility. The record shows that Kennedy intentionally discriminated against Brown and Patterson. The record is replete with Kennedy's use of racial epithets and other actions demonstrating his reprehensible views on race relations. Evidence shows that Brown was scheduled to the less desirable night shifts and assigned menial tasks which white employees were not required to perform. The district court also found that PHP Healthcare and Kennedy discriminated against Brown on the basis of his race with respect to the assignment of benefits and disciplinary actions taken by the company.

The district court further found that Kennedy told Patterson "not another nigger is to be hired." A few days after Patterson hired another black employee, she was terminated. The court further found that Patterson's

attempt to contact PHP Healthcare's headquarters in an effort to stop the ongoing discrimination at the Fort Hood facility was another producing cause of her termination. After her termination, Kennedy created and back dated a document for use at Patterson's T.E.C. hearing detailing alleged misconduct. This report stated that, while Kennedy was at PHP Healthcare's headquarters in Washington, D.C., Patterson took a three hour lunch, she failed to report to work on another day, and she was absent from work when a patient escaped. Kennedy then lied about using this document to fire Patterson when he testified before the T.E.C. Based on the evidence presented, the district court found that Patterson was, in fact, fired soon after disobeying Kennedy's directive "not to hire any more niggers," while Brown was constructively discharged after he was assured that the racially hostile work environment at PHP Healthcare would change.

The district court found that these facts, taken together, showed Kennedy's malice and/or reckless indifference to the federally protected rights of Brown and Patterson and awarded punitive damages. *See* 42 U.S.C. § 1981a(b)(1). Under § 1981, the district court found Kennedy and PHP Healthcare jointly and severally liable to Brown for $150,000. Under Title VII, the district court found PHP Healthcare liable to Patterson for $150,000 as an "employer" under the terms of the statute.

Based on the record presented, we cannot say that the district court abused its discretion in assessing punitive damages against Kennedy. Kennedy's actions in falsifying documents to establish a paper trail of misconduct for Brown coupled with his racial animosity support a determination of malicious or reckless conduct justifying punitive damages.

However, the quantum of this award does not comply with the three factors set out by the Supreme Court to determine the reasonableness of a punitive damage award.

See BMW of North America, Inc. v. Gore, 116 S. Ct. 1589, 1598-99 (1996). We understand that *BMW* deals with constitutional limits on punitive damages, but we find it instructive here. In *BMW*, the Court held that the following factors must be considered in determining whether a punitive damage award was reasonable: (1) the degree of reprehensibility of the defendant's conduct; (2) the disparity between the harm suffered and the damage award; (3) the difference between the damages awarded in this case and comparable cases. *Id.* An award of $150,000 fails to meet any of these three factors.

First, Brown was not personally subjected to verbal or physical abuse and no evidence suggests that Kennedy's actions reflected a prevailing attitude of PHP Healthcare to warrant such a large punitive assessment. In a close case such as this one, Kennedy's intentional falsification of documents is the only finding made by the district court which meets the malicious or reckless indifference requirement for imposing punitive damages. Next, the punitive damage assessment bears no "reasonable relationship" to the compensatory damage awards in this case. On remand, Brown's back-pay and lost benefits award will be substantially reduced from $22,648. Further, only nominal emotional damages are warranted in this case. Even if we based the punitive award on the original back-pay and benefits award of $22,648 the ratio of punitives to compensatory damages would be approximately 6.5 to 1. The Supreme Court has recognized a punitive damage award of 4 times the amount of compensatory damages to be "close to the line" in terms of constitutional propriety. *BMW*, 116 S. Ct. at 1602 (citing *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S. Ct. 1032, 1046 (1991)). Finally, the largest punitive damage award under § 1981 in this circuit, of which we are aware to date, is $50,000. *See Jett v. Dallas Indep. Sch. Dist.*, 798 F.2d 748, 762 (5th Cir. 1986), *aff'd in part and remanded in part*, 109 S. Ct. 2702 (1989). For these reasons, we vacate the punitive damage award in favor

of Brown against Kennedy and remand for reassessment in light of this opinion.

As to the punitive damage assessments against PHP Healthcare under § 1981 and Title VII, we again recognize that "the trier of fact's decision whether to award [punitives] damages is discretionary." *Sockwell v. Phelps*, 20 F.3d 187, 192 (5th Cir. 1994). However, we find no evidence in this record to support the district court's punitive damage assessment as to PHP Healthcare under either § 1981 or § 1981a.

The Supreme Court has held that § 1981 liability reaches only intentional discrimination, *General Bldg. Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 389-91, 102 S. Ct. 3141, 3149-50 (1982). The Court has also held that employers are not strictly liable for the acts of their employee. *Vinson*, 477 U.S. at 72, 106 S. Ct. at 2408. Agency principles apply to § 1981 (and to Title VII) to hold an employer liable "for those intentional wrongs of his employees that are committed in furtherance of the employment; the tortfeasing employee must think (however misguidedly) that he is doing the employer's business in committing the wrong." *General Bldg. Contractors*, 458 U.S. at 392, 102 S. Ct. at 3150-51. We agree that Kennedy's actions may be attributed to PHP Healthcare for purposes of compensatory damages, given his supervisory role as project manager.

However, the imposition of punitive damages under § 1981 and Title VII requires that the discrimination be malicious or done with reckless indifference. *Jones*, 761 F.2d at 1162; *and see* 42 U.S.C. § 1981a. All of the discriminatory acts in this case were solely acts of Kennedy. Kennedy was not a corporate officer of PHP Healthcare but was the "project manager" of the Fort Hood office. PHP Healthcare provided a handbook which expressly established a policy of non-discrimination and explained how employees could complain about discrimi-

natory practices to the company. Further, the vice president of human resources, John Bucur, testified that memos were distributed throughout the Fort Hood facility which also set out the procedures for making complaints to headquarters. No evidence suggests that Brown or Patterson followed these procedures in an attempt to notify PHP Healthcare's corporate office that Kennedy was discriminating against black employees. The record is completely void of evidence showing that PHP Healthcare took part in any discriminatory conduct much less any "malicious" or "reckless" conduct. The existence of the employment handbook setting forth a policy of non-discrimination is at least prima facie evidence of awareness on the part of PHP Healthcare of the federally protected rights of Brown and Patterson; and there is nothing in this record which purports to show that PHP Healthcare took any action which was inconsistent with that policy. Similarly, there is nothing in the record which would show that PHP Healthcare had knowledge of Kennedy's malicious or reckless conduct, or authorized, ratified, or approved Kennedy's actions. *See Fitzgerald*, 68 F.3d at 1263 (refusing to impose punitive damages under § 1981 where employer took no part in the intentional discrimination). Although Kennedy was the project manager of PHP Healthcare's Fort Hood facility, his actions alone, without some evidence showing that PHP Healthcare knew or should have known of Kennedy's malicious or reckless conduct, are insufficient to cause punitive liability to directly attach to PHP Healthcare.[15]

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[15] We have affirmed a district court's refusal to impose punitive damages based on evidence that a defendant had taken steps to eliminate racial discrimination and the ambiguous nature of the evidence at the district court level. *Jones v. Western Geophysical Co.*, 761 F.2d at 1162. When prompt remedial measures were taken by the employer, the evidence "did not compel the conclusion the [defendant] had behaved maliciously." *Id.* at 1162. Similarly, the evidence in this case does not compel the conclusion that PHP Healthcare behaved in a manner which warranted the imposition of punitive damages.

For these reasons, we hold that the district court abused its discretion in awarding punitive damages against PHP Healthcare in this case. Therefore, we vacate the district court's punitive damage award in favor of Brown and remand for reassessment against Kennedy under § 1981 in his individual capacity. We reverse Patterson's punitive damage award under Title VII because no individual liability attaches under this statute. *See Grant*, 21 F.3d at 651.

VIII.

PHP Healthcare and Kennedy further contend that the district court erred computing attorneys' fees in this case. When Brown and Patterson originally filed this suit on May 28, 1993, they were represented by the law firm of Salter and Thetford. Salter and Thetford withdrew as counsel on July 25, 1994. Brown retained David J. Guillory, David Weiser and Bill Bingham while Patterson hired W.V. Dunnam, Jr., as counsel. Brown then amended his complaint to add violations of 42 U.S.C. §§ 1981 and 1983. Patterson also filed an amended complaint adding intentional infliction of emotional distress. All claims except for Brown's § 1981 claim and Patterson's Title VII claim were dismissed at the summary judgment stage.

PHP Healthcare and Kennedy contend that the district court erred in awarding $22,500 in attorney's fees to Brown and Patterson for the time spent by the law firm of Salter & Thetford. Appellants also maintain that the $45,000 in attorney's fees awarded to Brown should have been reduced by the amount of hours spent on claims unrelated to the successful claims. We review a district court's award of attorney's fees for abuse of discretion. *Cooper v. Pentecost*, 77 F.3d 829, 831 (5th Cir. 1996).

Congress enacted the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988. Section 1988 authorizes district courts to award reasonable attorney's fees to prevailing parties in civil rights cases. *See Hensley*

v. Eckerhart, 461 U.S. 424, 429 (1983). In *Hensley*, the Supreme Court offered guidance for determining a proper award of attorney's fees in cases in which the plaintiffs brought a number of causes of action but prevailed on only a few or, in this case, one:

> Many civil rights cases will present only a single claim. In other cases the plaintiff's claims for relief will involve a common core of facts or will be based on legal theories. Much of counsel's time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis.

Id. at 435.

Here, the district court properly followed the teachings of *Hensley* and reduced the attorney's fees award claimed by Guillory, Weiser and Bingham and further adjusted Salter and Thetford's stated hours. The district court also applied the *Johnson* factors.[16] *See Cooper*, 77 F.3d at 831 (recognizing that the district court must examine the factors set out in *Johnson*). Per *Johnson*, the district court examined the novelty and difficulty of the case, the requisite skill required to perform legal services, the preclusion of other employment, customary fees, amounts involved and results obtained; the desirability of the case, the nature and length of the professional relationship awards in similar cases, and the time and labor required. *Johnson*, 488 F.2d at 717-719.

Based on the district court's *Johnson* factor analysis and the findings presented, we find no abuse of discretion with respect to the district court's attorneys' fee award of $68,898.84 to Brown and $36,000 to Patterson.

IX.

In summary, we affirm the district court's judgment against PHP Healthcare for back pay on Patterson's claim

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[16] *Johnson v. Georgia Hwy Express*, 488 F.2d 714, 717-719 (5th Cir. 1974).

of retaliatory discharge under 42 U.S.C. § 2000e-3. We also affirm the district court's judgment of liability against PHP Healthcare and Kennedy for back pay on Brown's claim of race discrimination under 42 U.S.C. § 1981. However, because of his failure to exercise reasonable diligence to maintain substantially similar employment and mitigate his damages, we vacate the district court's back pay award as to Brown and remand that award to the district court for redetermination. The district court is instructed to reduce Brown's back pay award by excluding all back pay from the date of his involuntary termination from Metroplex forward.

We vacate the awards of emotional damages as to both Brown and Patterson and remand such awards to the district court with instructions to assess nominal damages for such claims. We also vacate the district court's award of punitive damage as to Brown and remand that award to the district court to reassess the award consistent with the instructions herein and to assess such award against Kennedy in his individual capacity. As to Patterson, we reverse the punitive damage award in its entirety and render judgment that no punitive damages are recoverable by Patterson against PHP Healthcare in this case. We affirm the awards of attorneys' fees in this case.

APPENDIX B

[Filed March 28, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil No. W-93-CA-236

DONNA PATTERSON, DR. MICHAEL L. ADAMS,
and NICHOLAS BROWN,
Plaintiffs,

v.

P.H.P. HEALTHCARE CORPORATION
and MARK KENNEDY,
Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This case came on for trial before the Court without a jury on the 8th and 9th days of March, 1995. In accordance with the testimony and evidence presented and upon consideration of argument of counsel, the following findings of fact and conclusions of law are hereby entered.

Findings of Fact

Defendants' Illegal Race Discrimination

1. During all times relevant to this lawsuit, P.H.P. Healthcare Corporation ("PHP") provided psychiatric services at the Darnell Army Community Hospital at Fort Hood, Texas to the U.S. Army under a contract dated July 1, 1991. Specifically, PHP performs psychiatric services under the contract for certain beneficiaries of Army personnel at Fort Hood.

2. During Plaintiff Brown's and Patterson's employment at PHP, Defendant Kennedy was also an employee of PHP. Mr. Kennedy was the project manager, a supervisory position.

3. Mr. Brown is a black male, who was employed by Defendants beginning on February 10, 1992. Ms. Patterson is a white female, who, during the relevant time period, was the head nurse at PHP.

4. Prior to and during Mr. Brown's employment at PHP, Defendant Kennedy repeatedly and routinely referred to black people as "porch monkeys" and "niggers." Defendant Kennedy also used these racial slurs with respect to Mr. Brown specifically.

5. Defendant Kennedy also stated with respect to black people, that "they think you owe them a living," and "they are all shiftless."

6. Defendant Kennedy uttered these and other racial slurs against black people while on PHP premises and during regular working hours. Defendant Kennedy further drew a caricature of Mr. Brown that included exaggerated racial features. This occurred during the taking of depositions in this case.

7. After Plaintiff Brown had already been hired, Defendant Kennedy told Donna Patterson to cease hiring black people.

8. Terminated black employees in the unit supervised by Defendant Kennedy were regularly and routinely replaced with white employees.

9. Plaintiff Brown was replaced by a white employee.

10. Defendant discriminated against Plaintiff Brown on the basis of race with respect to assignment of duties.

11. Defendants discriminated against Plaintiff Brown on the basis of race with respect to work schedules.

12. Defendants discriminated against Plaintiff Brown on the basis of race with respect to opportunity for promotion.

13. Defendants discriminated against Plaintiff Brown on the basis of race with respect to discipline.

14. Defendants discriminated against Plaintiff Brown on the basis of race with respect to allocation of benefits.

15. Defendants discriminated against Plaintiff Brown on the basis of race with respect to termination/retention.

16. That Donna Patterson on the last few days of July, 1992 called corporate headquarters of PHP and called to its attention the facts set out in the two preceding findings.

17. That in March, 1992, a few minutes after conclusion of a meeting airing complaints by black employees of racial discrimination, Mark Kennedy told Donna Patterson that "not another nigger is to be hired."

18. Thereafter in the first few days of August, 1992, Donna Patterson, by reason of a definite need of an employee in the position of tech, hired Eddie Harris, who was black.

19. That Donna Patterson's action in calling corporate headquarters in an effort to stop the discrimination against Nicholas Brown as to the benefits owed him was a producing cause of PHP's terminating her employment with it.

20. That the action of Donna Patterson in hiring a black, namely Eddie Harris, was a producing cause of PHP's terminating her employment by it.

21. Kennedy prepared a document setting forth his reasons for terminating Ms. Patterson. This document (Plaintiff Patterson's "Exhibit 2") was prepared after the fact and back-dated by Kennedy and Dr. Chaparala, the medical director.

22. Kennedy lied about the document being used to terminate Ms. Patterson when he testified before the Texas Employment Commisison.

23. Plaintiff Patterson was terminated because she hired a qualified black technician, Eddie Harris, in contravention of the illegal directive given her by Kennedy.

Plaintiff Brown's Constructive Discharge

24. Plaintiff Brown's resignation was withdrawn by him in a timely manner, after he was led to believe by an official at Defendant's Corporate Headquarters that the hostile work environment might be improved.

25. Defendants' refusal to allow Plaintiff Brown to withdraw his resignation constituted constructive discharge, termination, and retaliation for Mr. Brown having complained of racial problems.

26. The Defendant's stated non-discriminatory reasons for its treatment of Brown are either untrue or are pretexts for racial discrimination.

Plaintiff Brown's Damages

27. Plaintiff Brown suffered mental anguish and emotional distress caused by the racially discriminatory actions of Defendants.

28. Plaintiff Brown diligently sought other employment subsequent to his employment at PHP.

29. Plaintiff Brown has mitigated his damages.

30. Plaintiff Brown worked a second job part-time while he was employed by Defendants.

31. Plaintiff Brown suffered loss of income and lost benefits in the amount of $22,648.00, as a result of Defendants' wrongful acts.

32. Plaintiff Brown has suffered emotional damage, and mental pain and suffering. The amount of such damages recoverable by Plaintiff Brown is $40,000.00.

33. Plaintiff Brown was subjected to willful and malicious discrimination, entitling him to punitive damages in an amount sufficient to deter the Defendant from future acts of this type. That amount is $150,000.00.

34. Plaintiff Brown was successful in this suit entitling him to an award of attorneys' fees.

Plaintiff Patterson's Damages

35. Plaintiff Patterson suffered mental anguish and emotional distress caused by the racially discriminatory actions of Defendants.

36. Plaintiff Patterson diligently sought other employment subsequent to her employment at PHP.

37. Plaintiff Patterson has mitigated her damages.

38. Plaintiff Patterson suffered loss of income and lost benefits in the amount of $40,000.00, as a result of Defendants' wrongful acts.

39. Plaintiff Patterson has suffered emotional damage, and mental pain and suffering. The amount of such damages recoverable by Plaintiff Patterson is $150,000.00.

40. Plaintiff Patterson was subjected to willful and malicious discrimination, entitling her to punitive damages in an amount sufficient to deter the Defendant from future acts of this type. That amount is $150,000.00.

41. Plaintiff Patterson was successful in this suit entitling her to an award of attorneys' fees.

Defendants' After-Acquired Evidence Argument as to Plaintiff Brown

42. Plaintiff Brown truthfully completed his application for employment at PHP.

43. Defendants were aware that Plaintiff Brown had never been adjudicated or convicted of criminal wrongdoing.

44. Defendants would not have immediately terminated the employment of Plaintiff Brown or any other employee who had never been adjudicated or convicted of criminal wrongdoing.

Defendant Mark Kennedy

45. There was no evidence that Mark Kennedy was a covered employee under Title VII.

46. Any finding of fact which should more appropriately be a conclusion of law is deemed so.

Conclusions of Law

1. Defendants have not articulated a credible legitimate non-discriminatory reason for their hostile and racially-based actions toward either Plaintiff Brown or Plaintiff Patterson.

2. Defendants committed acts of racial discrimination in the terms and conditions of Plaintiff Brown's employment, in violation of 42 U.S.C. §§ 1981, and 1981(b), with respect to (a) assignment of duties, (b) work schedules, (c) opportunity for promotion, (d) discipline, (e) allocation of benefits, and (f) termination/retention.

3. Plaintiff Brown was constructively discharged by being subjected to a racially hostile work environment.

4. Independent of the racially hostile work environment, Defendants' refusal to allow Plaintiff Brown to withdraw his resignation constituted constructive discharge, termination, and retaliation.

5. Defendants' "after-acquired evidence" argument fails because the PHP employee who hired him was aware of his background.

6. Defendants failed to carry their burden of proving that Defendants would have fired Plaintiff Brown immediately if they had discovered that he had never been adjudicated or convicted of criminal wrongdoing or because

his application for employment was not completely accurate.

7. Plaintiff Brown is entitled to damages for back-pay, reinstatement or front pay, lost benefits, mental anguish, and emotional distress, in the amount of $22,648.00.

8. Plaintiff Brown has suffered emotional damage, and mental pain and suffering. The amount of such damages recoverable by Plaintiff Brown is $40,000.00.

9. Defendants' racially discriminatory treatment of Plaintiff Brown rose to a level of intent that authorizes the Court to award punitive damages in the amount of $150,000.00.

10. Plaintiff Brown is entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

11. Defendant would not have terminated Plaintiff Patterson, "but for" her having employed a black technician after being instructed not to do so.

12. Plaintiff Patterson is entitled to damages for back-pay, reinstatement or front pay, lost benefits, mental anguish, and emotional distress, in the amount of $40,000.00.

13. Plaintiff has suffered emotional damage, and mental pain and suffering. The amount of such damages recoverable by Plaintiff Patterson is $150,000.00.

14. Defendants' racially discriminatory treatment of Plaintiff Patterson rose to a level of intent that authorizes the Court to award punitive damages in the amount of $150,000.00.

15. Plaintiff Patterson is entitled to an award of attorneys' fees pursuant to 42 U.S.C. § 1988.

16. The evidence of racial animus on the part of Kennedy and PHP shifted the burden to PHP of proving the adverse employment actions taken against these Plaintiffs would have been taken regardless of the racial dis-

crimination. PHP has not met its burden by a preponderance of the evidence.

17. Mark Kennedy is not a covered employee under Title VII and is not liable to either Plaintiff.

18. Any conclusion of law which should more appropriately be a finding of fact is deemed so.

SIGNED this 28th day of March, 1995.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-50319

DONNA PATTERSON; NICHOLAS BROWN,
Plaintiffs-Appellees

and

MICHAEL L. ADAMS,
Plaintiff

v.

P.H.P. HEALTHCARE CORPORATION; MARK KENNEDY,
Defendants-Appellants

Appeals from the United States District Court
for the Western District of Texas, Waco

ON PETITION FOR REHEARING
(September 11, 1996)

Before DUHÉ, BARKSDALE, and DEMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above case is DENIED.

ENTERED FOR THE COURT

/s/ Harold R. DeMoss, Jr.
United States Circuit Judge

APPENDIX D

[Filed Apr. 27, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

Civil No. W-93-CA-236

DONNA PATTERSON, DR. MICHAEL L. ADAMS,
and NICHOLAS BROWN,
Plaintiffs,

v.

P.H.P. HEALTHCARE CORPORATION and MARK KENNEDY,
Defendants.

SECOND AMENDED JUDGMENT

On the 8th and 9th days of March, 1995, this case came on for trial before the Court without a jury. In accordance with the Findings of Fact and Conclusions of Law, as well as the Court's Order of March 28, 1995, partially granting the Defendants' Motion for Summary Judgment, the Court enters its judgment as follows:

IT IS ORDERED, ADJUDGED, and DECREED that Plaintiff, Dr. Michael L. Adams have and recover nothing from defendants, P.H.P. Healthcare Corporation and Mark Kennedy.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Donna Patterson have and recover the following from Defendant P.H.P. Healthcare Corporation:

Loss of income and lost benefits in the amount of $40,000.00;

Emotional damage, and mental pain and suffering in the amount of $150,000.00; and

Punitive damages in the amount of $150,000.00

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Nicholas Brown have and recover the following from defendants P.H.P. Healthcare Corporation and Mark Kennedy, jointly and severally:

Back-pay and lost benefits in the amount of $22,648.00;

Emotional damage, and mental pain and suffering in the amount of $40,000.00; and

Punitive damages in the amount of $150,000.00.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Plaintiff Nicholas Brown be, within thirty (30) days, reinstated to his former position with defendant P.H.P. Healthcare Corporation.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that any relief not expressly granted in this judgment is DENIED.

SIGNED this 27th day of April, 1995.

/s/ Walter S. Smith, Jr.
WALTER S. SMITH, JR.
United States District Judge

SUBSIDIARIES AND AFFILIATES OF PHP HEALTHCARE CORPORATION

Sterling Communities Corp.

Welfare Systems Associates Inc.

PHP Int'l. Ltd.

PHP Insurance Agency

PHP Travel Ltd.

Eastwest Research

Commerce Park Development Corp.

Health Cost Consultants

PHP Health Services, Inc.

Virginia Chartered Health Plan, Inc.

Primary Care Corporation

PHP NJ MSO, Inc.

PHP/CHE, Inc.

PHP/IHS, Inc.

PHP GHE, Inc.

PHP International Holdings, Inc.

PHP Asia, Inc.

PHP International Management Services, Inc.

PHP Healthcare International, Inc.

Pinnacle Healthcare East Asia

Pinnacle Health Enterprises, L.L.C.